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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Public Packet Switching Service

NEW YORK TELEPHONE COMPANY — Transmittal Nos. 729 and 746
Revisions to Tariff F.C.C. No. 41

PACIFIC BELL — Transmittal No. 1142
Amendment of Tariff F.C.C. No. 128

SOUTHWESTERN BELL TELEPHONE COMPANY — Transmittal Nos. 1439 and 1503
Revisions to Tariff F.C.C. No. 68

AMERITECH OPERATING COMPANIES — Transmittal No. 89
Amendment of Tariff F.C.C. No. 89

BELLSOUTH TELEPHONE COMPANIES (on behalf of SOUTH CENTRAL BELL TELEPHONE COMPANY) — Transmittal No. 89
Amendment of Tariff F.C.C. No. 1

MEMORANDUM OPINION AND ORDER

Adopted: March 31, 1989; Released: April 10, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. By the captioned tariff transmittals, several Bell Operating Companies (BOCs) filed tariff revisions to enable them to offer basic public packet switching service (PPSS). That basic service complements the BOCs' provision of enhanced protocol conversion from collocated central office facilities. The *Protocol Waiver Order*,[1] waived maximum separation requirements imposed in the *Computer II* proceedings to permit such joint offerings by the BOCs. The *Protocol Waiver Order* imposed some conditions to prevent BOCs from competing unfairly against enhanced service providers.

2. As part of their PPSS filings, all of the captioned BOCs sought and received waivers of Section 61.74 of the Commission's Rules, 47 C.F.R. § 61.74, allowing them to crossreference certain state packet switching tariffs.

3. Telenet Communications Corporation (Telenet), Tymnet, Inc., (Tymnet), and, in one instance, MCI Telecommunications Corporation (MCI) filed various petitions to reject or, in the alternative, to suspend and investigate the PPSS tariff filings of the captioned BOCs. Petitioners contended that permitting incorporation by reference of state tariffs would constitute an abdication of the Commission's interstate jurisdiction. As relief, these petitioners requested that we either reject the filings or suspend and investigate them, requiring full cost support. All of these tariff revisions became effective upon the expiration of their original or deferred notice periods.

4. The *Protocol Waiver Order* required that any BOC which proposed to offer collocated protocol conversion pursuant to that waiver first obtain our approval of its plan for compliance with the non-structural safeguards. In a series of proceedings which parallel the instant PPSS tariff filings, this Bureau released orders approving the compliance plans of each of the captioned BOCs. Telenet, Tymnet, and MCI filed various applications for review of these orders, including the *BellSouth Compliance Order*, which approved the compliance plan of BellSouth on behalf of Southern Bell Telephone and Telegraph Company (Southern Bell).[2] On December 7, 1988, the Commission released the *BellSouth Review Order*.[3] The *BellSouth Review Order* reversed the Bureau decision insofar as that Bureau decision sanctioned the incorporation by reference of state tariffs and rescinded the waivers of Section 61.74 granted by the Bureau to Southern Bell and South Central Bell Telephone Company (South Central Bell).

5. The Tariff Division of the Common Carrier Bureau has rescinded the crossreference waivers granted to New York Telephone, Pacific Bell, Southwestern Bell, and Ameritech in light of the Commission's *BellSouth Review Order*. The Tariff Division directed those carriers to file revised tariffs in compliance with Section 61.74 of the Commission's rules and waived Section 61.38 for purposes of that filing. That action and the *BellSouth Review Order* have rendered questions relating to crossreference waivers and Section 61.38 data moot. We accordingly dismiss the petitions to reject these transmittals. We also deny the petitions to suspend and investigate.

II. BACKGROUND

6. Pursuant to the *Second Computer Inquiry* [4] and Section 64.702 of the Commission's Rules, 47 C.F.R. § 64.702, a common carrier may offer enhanced services only through a structurally separate subsidiary, and it must obtain by tariff its own basic services which underly those enhanced services. The Commission imposed these and other structural safeguards to serve the public interest by fostering fair competition in the enhanced services market. Protocol conversion, including asynchronous-X.25 conversion for packet switched networks, is defined as an enhanced service by Section 64.702.[5]

7. The *Protocol Waiver Order* granted waiver requests by several BOCs to provide asynchronous-X.25 protocol conversion without structural separation. That order found that provision of X.25 protocol conversion in conjunction with X.25 basic service from collocated central office facilities could permit the BOCs to realize certain natural economies, which could then be passed through to their customers. That order also said that wider use of packet switching could reduce the congestion and inefficiencies caused by sending data communications over the circuit switched network.

8. The *Protocol Waiver Order* concluded, however, that this new service configuration might enable the BOCs to engage in potentially unfair competition against other enhanced service providers by means of the BOCs' exclu-

sive control of the underlying basic access and exchange services. The structural separation waiver accordingly conditioned the waivers on the establishment of certain non-structural safeguards to replace the previous structural ones.[6]

III. PLEADINGS

9. Petitioners contend that each of these transmittals should be rejected because the carriers cross-referenced state tariffs. Those contentions are, of course, moot because the cross-reference waivers have been rescinded.

10. Petitioners also object because carriers did not provide Section 61.38 cost support data with these transmittals. Without cost support in the initial PPSS filings, they say, the Commission will have no baseline for determining that the rates are just, reasonable, and non-discriminatory, or that the compliance plans are working. As may be expected, these contentions are urged most strongly against the BOCs who submitted or made available the least data. *See, e.g.*, South Central Bell PPSS, Telenet Petition at 8-11. Some of the petitions also contend that preliminary analysis of the limited cost and revenue data which are available indicates that the BOCs have proposed rates which are not compensatory. *See, e.g.*, NYT PPSS, Tymnet Petition at 16-24.

11. In a different vein, MCI and Tymnet complain that the PPSS offering of Ameritech's Illinois Bell Telephone Company (Illinois Bell), which it calls Packet Switched Network Service (PSN), discriminates against its competitors. Under Ameritech's proposed rate structure, each of the other Ameritech operating companies offers a dedicated link, from the end user's premises to the exchange carrier's packet switch in the serving central office, in the operating company's general interstate special access tariff. Illinois Bell, in contrast, offers this dedicated link as a part of its specific PSN transport element. The petitioners claim that this link is a basic service element (BSE) which should be unbundled from the PSN transport element, pursuant to the comparably efficient interconnection standards (CEI) established in the *Third Computer Inquiry*.[7] Ameritech PPSS, MCI Petition at 9-11; Ameritech PPSS, Tymnet Petition at 20-25. The petitioners also argue that Illinois Bell's rate structure is discriminatory because it compels competitors to pay for twice as many of these specific transport elements as Ameritech does. *Id.*[8]

12. All of the captioned BOCs reply to the foregoing petitions. Each BOC contends that the cross-reference waivers were proper. These BOCs also generally maintain that the Commission need not monitor compliance with the non-structural conditions of the *Protocol Waiver Order* because the compliance plans have already been shown to ensure such compliance. *Id.* at 5-7; Southwestern PPSS, Southwestern Reply at 5-6. Each says the Commission does not need additional cost support, especially if such data have already been made available in one way or another. Ameritech PPSS, Ameritech Opposition at 5-8; South Central Bell PPSS, South Central Bell Reply at 8-9. They also draw on these data sources for substantive refutations of the petitioners' arguments that their rates are not compensatory. *Id.* South Central Bell PPSS, South Central Bell Reply at 8-9; NYT PPSS, NYT Opposition at 16-24.

13. Finally, Ameritech addresses the allegations by Tymnet and MCI that its PSN transport element for Illinois Bell is insufficiently unbundled and that its rate structure is unreasonably discriminatory. Ameritech states that the petitioners are incorrect in claiming that this element bundles dedicated access with other PSN functions. On the contrary, Ameritech asserts, the transport element is a result of unbundling dedicated access to exclude certain costly quality assurance functions which are unnecessary for packet switching, since the X.25 protocol already contains an error checking capability. Ameritech PPSS, Ameritech Opposition at 12-15. Ameritech also addresses the petitioners' claim that its rate structure is discriminatory because Ameritech's competitors must take a greater number of elements than Ameritech does. On the contrary, Ameritech maintains, this difference simply reflects the natural economies of having its own packet switch collocated in its serving central office, while its competitors must obtain additional transport from that central office to their packet switches. *Id.* at 15-17.

IV. DISCUSSION

14. The *BellSouth Review Order* directed the BellSouth Companies to file new tariffs that do not cross-reference state tariffs, but that Order did not require those carriers to submit Section 61.38 cost data. The Commission concluded that an investigation of these tariffs would not be warranted and that no additional Section 61.38 material was necessary at that time. *Id.* at para. 10. The Commission stated:[9]

> Because we find that existing market conditions make it unlikely that BellSouth could engage in anti-competitive or otherwise improper pricing, we conclude that it is reasonable to waive the requirement that BellSouth submit detailed cost and demand projections for this service at this time.

The Commission therefore waived Section 61.38 for the purposes of BellSouth's filing. *Id.*

15. We therefore find that no compelling arguments have been presented that these transmittals are patently unlawful so as to require rejection and that an investigation of these tariffs is not warranted at this time. We note that the Ameritech ONA Plan, filed on February 1, 1988, describes an initial list of basic serving arrangements (BSAs) that includes packet switching and dedicated access,[10] as well as other BSEs. Ameritech has not clarified the relationship between the PSN arrangements in this transmittal, including dedicated access, and the BSAs and BSEs it describes in its ONA plan. For example, it is not clear whether Ameritech will replace or modify the PSN service to reflect the BSAs and BSEs presented in its ONA plan.

16. Although the Commission generally approved Ameritech's BSAs, BSEs, and ONA plan, the Commission required Ameritech to amend its ONA plan by May 19, 1989, to explain further, among other things, how Ameritech applied the selection criteria that the Commission established for unbundling BSEs and BSAs.[11] That amendment will presumably include: (1) a full description of how its BSAs and BSEs relate to the dedicated access and other aspects of the PSN service described in

this transmittal, including whether Ameritech's BSAs and BSEs will modify or replace its PSN service and when such modification or replacement will occur; and (2) an update on how Illinois Bell's current and future basic packet service offerings satisfy the general CEI and ONA unbundling requirements and selection criteria.

17. We also note that basic service charges described in this transmittal appear to differ from future pricing plans described in Ameritech's subsequent ONA Plan. The Ameritech ONA Plan commits to maintaining "absolute price equality" between Ameritech's enhanced service operations and other enhanced service operations in charging for basic ONA services, regardless of whether Ameritech's enhanced service operation is physically collocated with its basic service operations.[12] According to the Ameritech ONA Plan, it will require its affiliated enhanced service operation to forego any possible "short wire" advantage and pay standard tariffed rates,[13] as if its enhanced services were not collocated. This "price parity" method, which the Commission approved in the *BOC ONA Order*,[14] differs from the pricing method for this service which Ameritech describes as taking advantage of the "efficiencies that integration and collocation provide."[15]

18. We find that the commitment Ameritech makes to price parity in its ONA plan, which the Commission has approved, must apply to PSN as well. This should address fully the discrimination and other concerns expressed in the MCI and Tymnet petitions regarding the application of PSN charges to Ameritech's enhanced service operations. This discrepancy does not, however, require investigation at this time because the *BOC ONA Order* did not require immediate implementation of ONA Plans. We anticipate that Ameritech's ONA amendments, due May 19, 1989, will include a detailed description of Ameritech's plans to modify existing tariffs to reflect price parity, and Ameritech's schedule for doing so.

V. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that, except to the extent herein indicated, the petitions to reject the captioned tariff transmittals filed by Tymnet, Inc., Telenet Communications Corporation, and MCI Communications Corporation ARE DISMISSED as moot in light of the action taken by the Commission in the *BellSouth Review Order*. The petitions to suspend and investigate the captioned tariff transmittals filed by Tymnet, Inc., Telenet Communications Corporation, and MCI Communications Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Petitions for Waiver of Section 64.702 of the Commission's Rules and Regulations, 100 FCC 2d 1057 (1985) (*Protocol Waiver Order*).

[2] BellSouth Corporation on Behalf of Southern Bell Telephone and Telegraph Company, Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations To Authorize Protocol Conversion Offerings, Mimeo No. 3480, released Apr. 1, 1986 (*BellSouth Compliance Order*). The parallel tariff filing of Southern Bell is not a subject of the instant Order.

[3] BellSouth Corporation on Behalf of Southern Bell Telephone and Telegraph Company, Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations To Authorize Protocol Conversion Offerings, FCC 88-333, released Dec. 6, 1988 (*BellSouth Review Order*).

[4] Second Computer Inquiry, Final Decision, 77 FCC 2d 384, *modified on reconsideration*, 84 FCC 2d 50 (1980), *further modified on reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC*, 693 F. 2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938, *aff'd on second further reconsideration*, FCC 84-190, released May 4, 1984.

[5] Packet switching is a form of digital data communication by which a large number of users may transmit data over common transmission lines more efficiently than by circuit switching, the conventional voice message network. A packet switched call begins by disassembling a data message into discrete subunits, supplemented with identification and addressing information. These packets are then transmitted through the network in short bursts, dispatched by packet switches from one node to the next on whatever route is immediately available. The packets are then reassembled at the destination. Each burst of data occupies costly transmission capacity only for a very brief interval. This results in increased efficiency compared to circuit switching, in which a transmission line is occupied for the duration of a call, even during idle moments.

The X.25 protocol is a generally accepted set of rules for synchronous packet switched intercommunication among host computers and associated facilities. Most personal computers operate in an asynchronous mode, and asynchronous to X.25 protocol conversion enables those computers to interface with packet networks. Another protocol, X.75, enables X.25 networks to interface with each other. Enhanced service providers (also called value added network providers), such as Tymnet and Telenet, provide untariffed packet switching and protocol conversion to end users over common carrier facilities. BOCs which choose to offer packet switching and protocol conversion must compete with established enhanced service providers. *See generally, Protocol Waiver Order*, 100 FCC 2d at 1063-68.

[6] These safeguards included: separate accounting and marketing systems within each BOC or regional holding company; a requirement that end users have equal access to the protocol conversion of both the BOCs and their competing enhanced service providers; the imposition of a charge on the basic services which the BOCs obtain from themselves to reflect the drain on their networks caused by protocol conversion (which requirement was abolished on February 18, 1988); and a requirement that the BOCs take the inter-office circuits used in their packet switched networks on the same terms and conditions as their competitors.

The *Third Computer Inquiry* replaced the structural separation requirements with certain non-structural ones, in the initial phase known as comparably efficient interconnection standards (CEI), and in the subsequent phase known as open network architecture (ONA). *See* Amendment of Section 64.702 of the Commission's Rules and Regulations, Report and Order, 104

FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Reconsideration Order*), *further reconsideration*, 3 FCC Rcd 1135 (1988), Phase II Report and Order, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *reconsideration*, 3 FCC Rcd 1150 (1988). The Commission concluded, however, that the substance of the specific requirements from the *Protocol Waiver Order* should be retained for collocated X.25-asynchronous protocol conversion and that the definition of enhanced services should continue to include protocol conversion. *See Phase I Order*, 104 FCC 2d at 1106, para. 301; *Reconsideration Order*, 2 FCC Rcd at 3047-48, paras. 85-86; *Phase II Order*, 2 FCC Rcd at 3079-80, paras. 51, 57-58, 62.

[7] *See* note 6, *supra*.

[8] MCI also states that the Ameritech PSN tariff discriminates against interexchange carriers (ICs) who purchase access to provide their own PPSS offerings, because these ICs must pay switched and special access charges, whereas Ameritech's PSNS customers (*i.e.*, enhanced service providers) pay only the generally lower PSN rates for switched service and, in Illinois, for dedicated service. Ameritech PPSS, MCI Petition at 5-9.

[9] *BellSouth Review Order* at para. 10 (footnote omitted).

[10] Open Network Architecture Plan of the Ameritech Operating Companies, CC Docket No. 88-2, Phase I (filed Feb. 1, 1988) (Ameritech ONA Plan) at 26; Appendix 5.

[11] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, Memorandum Opinion and Order, FCC 88-381 (released Dec. 22, 1988) (*BOC ONA Order*) at paras. 130-135.

[12] Ameritech ONA Plan at 86.

[13] *Id.*

[14] *BOC ONA Order* at para. 166.

[15] Ameritech PPSS, Ameritech Opposition at 16.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 10, 1989

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON JOINT BOARD'S RECOMENDATION TO CHANGE FREQUENCY AN TIMING OF MONITORING REPORTS AND BYPASS REPORTS (CC DOCKET 87-339)

On March 24, 1989, the Federal-State Joint Board in CC Docket No. 80-286 released its *Second Study and Report* (FCC 89J-3) reviewing the impact of its non-traffic sensitive (NTS) cost recovery program.[1] The Joint Board has recommended that (1) the frequency of future Monitoring Reports be reduced from four times a year to twice a year, (2) future Monitoring Reports be released in January and July of each year through 1992, and (3) that the frequency of bypass reports from the regional Bell companies and GTE be reduced from twice a year to once a year, to be filed by the end of April of each year through 1992.[2]

The Joint Board provided the following reasons in support of these changes: Unnecessary paperwork should be eliminated from the monitoring process. The NTS recovery program has not produced any harmful result to date. No urgent matters requiring frequent reports are pending. There are no further changes in the NTS recovery program that are designed to provide additional deterrence to bypass. At present, the only data received more often than semi-annually are penetration data (received three times a year and reported separately in subscribership reports), price index data (available monthly from the Bureau of Labor Statistics), and aggregate usage and pool data (received monthly from the National Exchange Carrier Association).

Before acting on these recommendations, this Commission seeks comments on them. Interested parties should file comments on the Joint Board's recommendations by **May 1, 1989,** and reply comments by **May 22, 1989,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. Copies should also be sent to the members and staff of the Joint Board (list attached) and to the Commission's contractor for public service records duplication: International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

For further information contact Alexander Belinfante, Industry Analysis Division of the Common Carrier Bureau, at (202) 632-0745.

SERVICE LIST

All items filed in CC Docket No. 87-339 must be filed with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554, and the following Commissioners and staff members:

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FOOTNOTES

[1] MTS and WATS Market Structure, Amendent of Part 36 of the Commission's Rules and Establishment of a Joint Board, Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket Nos. 78-72, 80-286, and 87-339, FCC 89J-3, Second Study and Report, released March 24, 1989.

[2] *Id.* at para. 52 and 66.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs — AAD 7-1694

MEMORANDUM OPINION AND ORDER

Adopted: March 31, 1989; Released: April 10, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In the *Joint Cost Order*,[1] the Commission required certain subject carriers, including Southwestern Bell Telephone Company (Southwestern), to file manuals for separating the costs of regulated telecommunications services from the costs of nonregulated activities. In response to this requirement, Southwestern filed a cost allocation manual on August 31, 1987. That manual described Southwestern's nonregulated activities, listed the activities Southwestern proposed to treat as incidental activities, and provided information on Southwestern's affiliate transactions, employee time reporting procedures, and cost apportionment methods.

2. Our review of that manual in the *Southwestern Order*[2] revealed that certain areas of the manual required clarification or revision. Despite these problem areas, we conditionally approved Southwestern's manual. We determined that the manual provided adequate assurances against the misallocation of costs and revenues between regulated and nonregulated activities to permit its implementation on January 1, 1988. We required, however, that Southwestern submit revisions addressing each of the specified problem areas. We stated that these revisions would be subject to public comment and our review, and that we would take all appropriate action, including the prescription of specific apportionment procedures, in the event we disapproved any part of the revised manual.[3]

3. Southwestern submitted its revisions on March 29, 1988, and further revised its manual on June 30, 1988, September 30, 1988, and December 30, 1988.[4] The March 29 revisions provide additional information regarding the problem areas identified in the *Southwestern Order* and, according to Southwestern, reflect the clarifications, additions, and other changes required by that Order.[5] MCI Telecommunications Corporation (MCI) filed comments on the March 29 revisions, and Southwestern replied. The June 30 and September 30 revisions propose changes to Southwestern's affiliate transactions, incidental activity, and employee time reporting sections; update Southwestern's organizational chart; add the provision of embedded digital network channel terminating equipment and customer dialed account recording to Southwestern's list of nonregulated activities; and revise certain cost pool assignment and apportionment methods. The December 30 revisions add a definitional section to the manual; provide substitute pages for the portions of the manual that describe Southwestern's methods for assigning costs to cost pools, for apportioning cost pools between regulated and nonregulated activities, and for determining the costs of the assets and services Southwestern receives from its nonregulated affiliates; and make other changes in the affiliate transactions, nonregulated activity, incidental activity, and employee time reporting sections of the manual. No party commented on the June 30, September 30, or December 30 revisions.

4. In this Order, we address Southwestern's manual, as revised on December 30, 1988, as well as MCI's comments on the March 29 revisions and Southwestern's reply to those comments. We find, subject to certain exceptions, that the December 30 manual is consistent with the Commission's requirements for cost allocation and properly implements the *Southwestern Order*.[6] Before turning to the exceptions, we wish to emphasize that this Order does not discuss the many areas that no party has asked us to address and in which Southwestern has complied fully with Commission requirements and with the *Southwestern Order*. We also wish to emphasize that the exceptions are very limited in relation to the manual as a whole. Accordingly, we approve the December 30 manual, subject to the filing of additional information and revisions specified herein. This filing shall be made no later than May 31, 1989.[7]

5. In the *Southwestern Order*, we stated that Southwestern would be required to make all revisions we approved or ordered effective as of January 1, 1988.[8] We recognize that such retroactivity may not be reasonably practicable with regard to certain additional changes we require in this Order. We direct Southwestern to make such changes effective January 1, 1988 to the extent possible, and to identify in the transmittal to its respective filings which changes, if any, it cannot reasonably implement as of January 1, 1988, and the justification for not implementing those changes retroactively.[9]

II. DISCUSSION

A. Overall Sufficiency of the Revisions

6. Under the *Joint Cost Order*, cost allocation manuals must describe the nonregulated activities, incidental activities, affiliate transactions, employee time reporting procedures, and cost apportionment methods of the telephone operating companies that will apply them. In the *Southwestern Order*, we required Southwestern to provide additional, and in certain instances, corrected information in relation to each of these areas. We were particularly concerned with the methods Southwestern proposed for assigning costs to cost pools and for apportioning cost pools between regulated and nonregulated activities. We found those methods important because the costing system established in the *Joint Cost Order* requires telephone companies to divide the accounts and subaccounts listed in the Commission's Uniform System of Accounts (USOA) into homogeneous cost categories or pools that can be directly assigned to, directly or indirectly attributed to, or allocated between regulated and nonregulated activities on a cost causative basis.[10]

7. In the *Southwestern Order*, we found that Southwestern had failed to provide meaningful explanations of many of its cost pool assignment and apportionment

methods, and we ordered Southwestern to explain those methods in detail.[11] We did not, however, require Southwestern to identify and justify the reporting codes, accounting records, and records of charges to accounts that support those methods. We determined, despite MCI's argument to the contrary, that such information would not be necessary for us to evaluate Southwestern's overall apportionment system.[12]

8. Southwestern's March 29 revisions provide extensive additional information regarding its cost pool assignment and apportionment methods. MCI argues that although this information makes the manual more "cosmetically helpful," many of Southwestern's cost pool assignment and apportionment methods remain vague.[13] MCI argues that we must require Southwestern to provide more thorough descriptions of its cost pool assignment and apportionment methods in order to evaluate the manual properly and that we should require that information at this time. MCI claims that Southwestern's entire costing processes continue to rely on the review and analyses of fundamental accounting records and reporting codes that the manual neither fully explains nor justifies. MCI contends that Southwestern should be required to describe these records and codes more precisely, and to justify using them as the basis for apportioning costs between regulated and nonregulated activities.[14]

9. MCI argues further that we should clarify the procedures we intend to employ in auditing and overseeing the cost allocation manual process. In MCI's view, these procedures should make clear that telephone companies must make their fundamental cost data available to their independent auditors and to the Commission, and should specify how the Commission intends to review and test that data. In addition, MCI maintains that we should state the processes we will employ to review independent auditor reports and to obtain any relevant cost data that the independent auditors do not review.[15]

10. In reply, Southwestern states that MCI's comments are nothing more than a *pro forma* repetition of MCI's dissatisfaction with the Commission's exercise of its regulatory authority in relation to cost allocation manuals. Additionally, Southwestern argues that although MCI purports to criticize the March 29 revisions, it does not identify any specific shortcoming in those revisions or describe any particular case in which they might lead to a misallocation of costs.[16] Southwestern states that the Common Carrier Bureau is competent to oversee the auditing of its cost allocation manual. Finally, Southwestern promises to provide full disclosure of relevant data to its independent auditors and to the Commission.[17]

11. Our review of the December 30 manual, which differs considerably from the March 29 manual that MCI criticizes, confirms that the manual now contains sufficient information for us to evaluate virtually all of Southwestern's cost pool assignment and apportionment methods. Originally, we required additional information regarding those methods for two reasons. First, we wanted to ensure that the Commission, Southwestern, and the independent auditors would share a common understanding of the manual. We are satisfied that the December 30 manual achieves this purpose. A more detailed manual would not increase our ability or the independent auditors' ability to verify proper implementation of the manual.[18]

12. Our second reason for requiring additional information regarding Southwestern's cost pool assignment and apportionment methods was to enable us to review the substantive merit of those methods that Southwestern had not adequately explained. In virtually all instances, the December 30 manual provides sufficient information to let us perform this review. As discussed below, we require additional information regarding a limited number of Southwestern's cost pool assignment and apportionment methods. However, that information need not include the reporting codes, accounting records, analytical steps, and other procedures that Southwestern has developed to implement its apportionment methods.[19] Accordingly, we will not require Southwestern to provide an additional level of detail regarding its overall cost pool assignment and apportionment methods.

13. We agree with MCI, however, that the data gathering methods and documentation underlying the apportionment procedures set forth in the manual are critical in any decision as to the reasonableness of the amounts assigned or allocated to nonregulated activities. However, that does not justify inclusion of such material in the manual to the extent that the resulting document is so cumbersome as to obscure its primary purpose--the comprehensive description of how the carrier complies with the Commission's cost apportionment policies and rules.[20] It may well be that our audits or our review of the independent auditor reports will reveal problems not with the apportionment procedures themselves, but with the underlying data collection and recording procedures. If this is the case, we will require revisions in the apportionment results and, if necessary, disallow for ratemaking purposes those costs that have been improperly included in the carriers' regulated accounts.[21]

14. We also decline to specify the precise procedures we will employ in auditing and overseeing the cost allocation manual implementation process. While we intend to examine cost allocation and other accounting procedures in the course of our regular carrier audits and our review of independent auditor reports,[22] the procedures we will employ will be tailored to the circumstances we encounter. We emphasize, however, that Southwestern must retain a complete audit trail of all cost allocations and affiliate transactions, and must make that information as well as the independent audit and all related data and workpapers available to the Commission.[23] We will, of course, require further changes to the manual in the event our own audits or our review of the independent auditor reports reveal a need for such action.[24]

B. Affiliate Transactions

15. *Introduction.* The affiliate transactions section of Southwestern's initial manual listed and briefly described a number of transactions between Southwestern and its nonregulated affiliates. In the *Southwestern Order*, we found that those listings and descriptions were insufficient to establish that Southwestern would comply with the Commission's affiliate transaction rules, and we required Southwestern to revise its manual in a number of respects.[25] While Southwestern's December 30 manual generally complies with our requirements, it also discloses several matters that Southwestern must correct or clarify.

16. *Corporate Affiliates Chart.* In the *Joint Cost Order* the Commission required that each carrier include "[a] chart showing all of its corporate affiliates" in its cost allocation manual.[26] Since Southwestern's initial manual

contained no such chart, we required Southwestern to include one in its revisions.[27] Although the December 30 manual contains an organizational chart, it shows only "those affiliates that have transactions with Southwestern Bell (other than those whose transactions consist solely of the purchase of tariffed services at tariffed rates)."[28] Southwestern asserts that a complete chart is not necessary to achieve the purposes behind the cost allocation manual and the affiliate transactions rules. According to Southwestern, its approach eliminates the need for continual updating of the manual to reflect corporate developments having no effect on the extent of Southwestern's compliance with the Commission's rules.[29] We disagree with Southwestern on this matter. In order for us to understand fully the organizational structure of Southwestern Bell Corporation as well as the actual and potential transactions between Southwestern and its affiliates, we require a complete chart of Southwestern's corporate structure. Southwestern shall provide such a chart in its further revisions.

17. *Terms of Transactions*. In the *Southwestern Order*, we required Southwestern to specify the terms of all its affiliate transactions.[30] In its December 30 manual, Southwestern states that it will record certain affiliate transactions involving the provision of services at prevailing company or market prices, and that it will use mere offers to provide services to establish such prices.[31] This use of mere offers is inconsistent with the Commission's affiliate transaction rules. Under those rules, actual transactions between the affiliate providing the service and third parties, rather than mere offers to provide a service, are necessary to establish a prevailing company or market price for a service that a carrier provides to or receives from a nonregulated affiliate.[32] In its further revisions, Southwestern shall state that it will use only actual transactions to establish prevailing company or market prices for such services.

18. *Official Communications*. In the *Southwestern Order*, we required Southwestern to explain whether the official communications services it provides to nonregulated affiliates include services or service components that Southwestern provides to nonaffiliates at tariffed rates.[33] In lieu of complying with this requirement, Southwestern states in its December 30 manual that "[l]ocal exchange services can be provided to all affiliates within Southwestern Bell's five state region on a tariffed basis."[34] The December 30 manual also states that it provides inter-local access transport area (LATA) private lines and tie lines to certain specified affiliates at "tariff equivalent rates."[35] That manual, however, does not explain the meaning of "tariff equivalent rates" as used in this context. In its further revisions, Southwestern shall state the extent to which it actually provides local exchange services at tariffed rates. Southwestern shall also explain, in its further revisions, how it calculates the "tariff equivalent rates" it applies to inter-LATA private lines and tie lines.[36]

19. *Reservation Services*. In its December 30 manual, Southwestern states that it makes airline, hotel, and car rental reservations for employees of its nonregulated affiliates, and that it receives compensation for these services directly from the travel service providers.[37] Southwestern does not, however, state the amount of this compensation or the basis on which it is determined. In its further revisions, Southwestern must show how its treatment of these transactions is consistent with the affiliate transaction rules. If Southwestern does not provide these reservation services to non-affiliates in a sufficient number of cases to establish a prevailing company price for the services, Southwestern's showing shall include a statement that the compensation Southwestern receives for these services equals or exceeds the costs Southwestern incurs in their provision.

20. *Customer Referral Services*. In its December 30 manual, Southwestern states that it provides customer referral services to Southwestern Bell Mobile Systems, Inc. (SBM). Southwestern states further that SBM pays a standard fee for each successful referral and that this fee exceeds Southwestern's fully distributed costs.[38] In its further revisions, Southwestern must clarify whether the costs being exceeded include the costs of all referrals or just the successful referrals. If only the costs of the successful referrals are included, Southwestern must show in detail how its treatment of customer referral services is consistent with the affiliate transaction rules.

21. *Leasing Services*. Southwestern addresses these services in two portions of its December 30 manual that require clarification. In the affiliate transaction section, Southwestern states that it leases space, land, and towers for telecommunications equipment to Metromedia Paging Services, Inc., at a "market equivalent rate," but provides no definition of that term.[39] In its further revisions, Southwestern must explain that term and show in detail how use of a "market equivalent rate" is consistent with the affiliate transaction rules. The incidental activity section of the December 30 manual states that Southwestern may also lease space on antenna towers to Southwestern Bell Mobile Systems, Inc. (SBMS), but does not make clear how Southwestern would account for such leasing.[40] In its further revisions, Southwestern must clarify whether it intends to lease space on antenna towers to SBMS. If it so intends, Southwestern shall list such leasing as an affiliate transaction and specify terms for it that are consistent with the affiliate transaction rules.

22. *Hotel Rooms*. In its December 30 manual, Southwestern states that one of its affiliates, SBC Asset Management, Inc., is a limited partner in an entity that owns several hotels in St. Louis, Missouri. Southwestern states further that under a ten-year agreement, it receives hotel rooms in one of these hotels "at a fixed rate subject to annual adjustments based on the average percent increase in rates at selected downtown St. Louis hotels."[41] Southwestern does not explain how the initial "fixed rate" was determined. In its further revisions, Southwestern must do so, and show in detail how the combination of that "fixed rate" and the annual adjustments results in terms that are consistent with the affiliate transaction rules.

23. *Sales Agency*. The December 30 manual states that Southwestern receives marketing services from Southwestern Bell Telecom (SBT). Southwestern proposes to record as the costs of these services the commissions it pays SBT employees under a sales agency plan.[42] These terms appear inconsistent with the Commission's requirements for services that nonregulated affiliates provide carriers. In its further revisions, Southwestern shall specify that it will record these transactions at SBT's fully distributed costs.[43]

C. Incidental Activities

24. The incidental activities section in Southwestern's initial manual consisted of a list, with an accompanying brief description, of each activity that Southwestern considered incidental and a blanket declaration that each listed activity met the Commission's criteria for incidental treatment.[44] Some of the activities Southwestern listed as incidental appeared to involve affiliate transactions.[45] In the *Southwestern Order*, we required Southwestern to justify the incidental status of each individual activity, to explain whether each such activity involves affiliate transactions, and, if so, to show how its treatment of those transactions complies with the affiliate transaction rules.[46] The December 30 manual includes a substantially expanded account of Southwestern's incidental activities.[47] Although the revisions generally satisfy our concerns, they raise three new issues.

25. First, Southwestern lists "[l]easing of surplus space on Southwestern Bell premises" as an incidental activity without making clear whether this service is provided to affiliates.[48] Southwestern must clarify this matter in its further revisions. If it does not provide this service to affiliates, it must state that it does not. If it does, it must list this service in the affiliate transactions section of its manual and account for it as an affiliate transaction.

26. Second, Southwestern states that it "may also lease space on antenna towers" to third parties and indicates that it may wish to treat such leases as an incidental activity.[49] Since an activity is eligible for incidental treatment only if it has been traditionally treated as regulated for accounting purposes,[50] Southwestern's conditional statement suggests that this activity may not be eligible for incidental treatment. In its further revisions, Southwestern shall state whether it intends to lease space on antenna towers to third parties on an incidental basis. If it intends to do so, Southwestern shall show in detail why it believes that activity to be eligible for incidental treatment.

27. Third, Southwestern lists the provision of software developed for Southwestern Bell's regulated operations as an incidental activity and notes that "software available to outside entities is also available to Southwestern Bell affiliates."[51] If Southwestern intends to provide this service to affiliates, Southwestern must also list it in the affiliate transactions section of its manual, and account for it as an affiliate transaction. If Southwestern does not intend to provide this service to affiliates, it shall so state in its further revisions.

D. Employee Time Reporting

28. In the *Southwestern Order*, we required Southwestern to clarify its procedures for capturing and apportioning nonproductive time.[52] While the December 30 manual generally addresses our concerns, that manual defines nonproductive time as consisting of "vacations, holidays, excused workdays paid and designated holidays."[53] We find the definition insufficient because it fails to make clear the difference between "holidays" and "designated holidays" and because it does not address time devoted to administrative activities.[54] Southwestern must provide a clear and complete definition of nonproductive time in its further revisions.

29. Additionally, in a tabulation designed to illustrate the calculation of a factor to capture "break time," Southwestern uses "1/2 hour break time per day" as the numerator of an equation.[55] It does not explain, however, the derivation of this figure. In its further revisions, Southwestern must do so.

E. Apportionment Proposals

30. *Imprecise Terminology*. In its initial manual, Southwestern used many undefined terms and acronyms to describe its cost pool assignment and apportionment methods. In the *Southwestern Order*, we found that Southwestern's use of those terms and acronyms made the manual difficult to understand and created considerable potential for ambiguity. We required Southwestern restrict its manual to unambiguous and understandable cost pool assignment and apportionment methods, and to define each term that its manual employs.[56] Although Southwestern's December 30 manual generally complies with these requirements, one overall problem persists.

31. In a number of depreciation and expense accounts, Southwestern states that it will assign costs to cost pools "in the same proportion as the investment" or "the related investment" in one or more specified accounts.[57] Southwestern states that it employs "the ratio of the specific component of investment to the total investment" in each account that applies this assignment method, that its manual employs "[s]everal different measures of relative investment cost," and that the "specific measure used for an account depends upon the particular investment or expense account."[58] Southwestern, however, never states what measures of investment or relative investment it intends to use. It shall do so by stating clearly the "specific components of investment" that will comprise the numerator of each of its ratios, "the total investment" that will comprise the denominator of each of its ratios, and the depreciation or expense amounts to which each of its ratios will be applied. Southwestern shall provide this information on a cost-pool-by-cost-pool basis in the cost table in its further revisions.

F. Individual Accounts

Account 2002 - Property Held for Future Telecommunications Use and Account 2003 - Telecommunications Plant Under Construction - Short Term

32. In its December 30 manual, Southwestern proposes to divide each of these accounts into regulated, nonregulated, and common cost pools. The regulated and nonregulated pools are to be directly assigned to regulated and nonregulated activities. In a comments column, Southwestern states that the common pools are to be apportioned "on the basis of the associated relative investment."[59] While such apportionments would be proper, the manual also states that the common pools are to be apportioned in proportion to the relative apportionment of Southwestern's "Telecommunications Plant in Service, Accounts 2111 through 2690."[60] Because Southwestern is assigning large portions of its investment in telecommunications plant in service directly to regulated and nonregulated activities, we believe that these apportionment factors may reflect investment associated with the direct assignment pools within Accounts 2002 and 2003 as well as "associated relative investment."[61] In its further revisions, Southwestern shall clarify its apportionment methods for these common pools. If Southwestern is not excluding all investment that is being directly assigned to regulated and nonregulated activities from the calculation

of the apportionment factors for these common pools, Southwestern shall also justify in detail its overall apportionment methods for these accounts.[62]

Account 2111 - Land

33. Southwestern's initial manual listed equal access and network reconfiguration cost pools within this account, but did not explain the procedures Southwestern intended to use to assign costs to this pool. In the *Southwestern Order*, we required Southwestern to provide that explanation.[63] In its December 30 manual, Southwestern consolidates these pools into a single "Direct" pool and states that it will analyze field reporting codes to assign land investment to this pool. Southwestern's description of this analysis consists of statements that the codes it will analyze "are used in operations to report activities for which time and expenses are incurred" and "are assigned to specific work activities and are reported by employees using positive time reporting procedures."[64] While these statements suggest that Southwestern has time reporting codes for equal access and network reconfiguration operations, the statements do not make clear how those codes enable Southwestern to determine the amount of land investment that supports its equal access and network reconfiguration equipment. Therefore, we require Southwestern describe in detail, in its further revisions, its method for assigning costs to this cost pool.

Account 2121 - Buildings

34. In its initial manual, Southwestern did not make clear its apportionment method for this account. In the *Southwestern Order*, we required Southwestern to provide detailed information and clarification regarding that method.[65] We specified that Southwestern must list all cost pools that it intends to use and explain any studies that it intends to perform to apportion building investment.[66] Several aspects of Southwestern's responses to these requirements warrant discussion.

35. First, the December 30 manual states that Southwestern will divide its building investment into a "Direct" cost pool, for equal access and network reconfiguration investment, and three common cost pools, for "Central Office," "Distribution Services and Station Connections," and "Administrative Office Space" investment.[67] We believe that this cost pool structure is insufficient to reflect cost causality for a company, like Southwestern, that has over $1.9 billion in building investment and anticipates that its building investment will increase by approximately 4.4% during 1989.[68] For example, the "Administrative Office Space" pool apparently houses a number of functional groups that support regulated and nonregulated activities in quite different ways. Disaggregation of this pool into separate pools for the various functional groups should yield increased precision in apportionment results that far outweighs any additional burden on Southwestern.[69] Therefore, we require Southwestern to revisit its cost pool structure for Account 2121.

36. Second, in its December 30 manual, Southwestern states that it will analyze building use to assign costs to its "Central Office," "Distribution Services and Station Connections," and "Administrative Office Space" pools within this account.[70] The manual indicates that this study identifies the number of square feet within each of Southwestern's buildings that are used for central office, distribution services and station connections, and administrative operations, respectively.[71] While this procedure is appropriate, the manual does not specify how Southwestern uses square footage data to assign building investment to cost pools. In its further revisions, Southwestern shall describe its procedures in this regard. If those procedures do not include the calculation of building space ratios for each of Southwestern's buildings and the application of each of those ratios to Southwestern's investment in the building to which it relates, Southwestern shall justify those procedures in detail in its further revisions.[72]

37. Third, the December 30 manual states that Southwestern will analyze field reporting codes to assign costs to its "Direct" pool within this account.[73] Southwestern's description of this analysis is identical to its description of the analysis proposed for land investment and, like that other analysis, fails to make clear how time reporting codes enable Southwestern to identify building investment that supports equal access and network reconfiguration equipment.[74] Consistent with our treatment of land investment, we require Southwestern to describe in detail, in its further revisions, its method for assigning equal access and network reconfiguration costs to this "Direct" cost pool within Account 2121.[75] If that method does not include a building use analysis similar to the analysis Southwestern will be conducting for its other cost pools within this account, Southwestern shall also explain in detail how the application of two different analyses would produce an accurate apportionment of Southwestern's building investment between regulated and nonregulated activities.[76]

38. Fourth, the December 30 manual states that Southwestern will apportion its central office cost pool within Account 2121 in proportion to the overall apportionment of Southwestern's investment in "central office equipment, Accounts 2211 through 2232."[77] Since Southwestern records equal access and network reconfiguration investment in its central office equipment accounts, we believe that this apportionment factor, in combination with the direct assignment to regulated activities of the equal access and network reconfiguration cost pools within Account 2111, will result in an overapportionment of costs to regulated activities. Accordingly, we require that Southwestern either amend its manual to specify that equal access and network reconfiguration costs will be excluded from the calculation of the apportionment factor for its central office cost pool within Account 2121 or explain in detail why such an exclusion should not be mandated.[78]

39. Finally, Southwestern proposes to use the "[r]elative value of Distribution Services and Station Connections Salaries and Wages, in Account 6311 through 6441" to apportion its "Distribution Services and Station Connections" and "[t]otal company salaries and wages" to apportion its "Administrative Office Space" cost pools within this account.[79] While we have no objection to the apportionment factor for the "Distribution Services and Station Connections" pool,[80] we believe that Southwestern's distribution services and station connections wages and salaries should be excluded from the calculation of the apportionment factor for the "Administrative Office Space" pool. In the event Southwestern seeks to retain this pool in its further revisions, Southwestern must either perform this exclusion or explain in detail why it should not be mandated.

Account 2212 - Digital Electronic Switching, Account 6211 - Analog Electronic Expense, and Account 6212 - Digital Electronic Expense

40. In its initial manual, Southwestern proposed a series of intricate and internally inconsistent methods for apportioning analog and digital switching costs between regulated and nonregulated activities. In the *Southwestern Order*, we determined that those methods required substantial revision. We specified that Southwestern must be "unambiguous with regard to its cost pools and cost apportionment bases," and that the apportionment methods for network plant should reflect only current or imminent nonregulated activities.[81] In its December 30 manual, Southwestern lists four nonregulated activities--protocol conversion, voice message storage, customer dialed account recording (CDAR), and enhanced services planning and development--that use central office equipment on a non-tariffed basis.[82] While the apportionment methods the December 30 manual proposes to reflect these activities are an improvement on the methods proposed in the initial manual, two matters require further clarification.

41. First, the December 30 manual lists a packet switching cost pool within Account 2212 that would be apportioned between regulated and nonregulated activities. While this pool appears appropriate, that manual states that "[Southwestern] does not have any common use of digital electronic switching equipment in the provision of nonregulated activities."[83] In its further revisions, Southwestern must clarify this statement. If, as appears to be the case, Southwestern intended to state that it forecasts no nonregulated usage of the digital electronic switching equipment whose costs are not assigned to the packet switching pool within Account 2212, Southwestern must use language that reflects that intent.

42. Second, in its December 30 manual, Southwestern indicates that some of the switching equipment it uses to provide enhanced services is also used to provide regulated services. Southwestern assigns the expenses it incurs in connection with this equipment to common cost pools within Account 6211 and 6212. Southwestern proposes to apportion these pools "on the basis of Account 2211-77C, relative actual usage" and "on the basis of Account 2212-377C, Digital Electronic Switching, relative actual usage"[84] Southwestern neither explains these apportionment factors nor attempts to show why they might accurately apportion switching expenses between regulated and nonregulated activities.

43. When we ordered Southwestern to "provide us with a manual that is unambiguous with regard to its cost pools and cost apportionment bases" and which defines all of the numerous acronyms and phrases used to describe those methods,[85] we anticipated that Southwestern would not use any undefined terms, such as "Account 2211-77C" and "Account 2212-377C," in its manual. We also anticipated that Southwestern would employ apportionment factors that are reasonably susceptible to understanding and that Southwestern would provide sufficient information to permit evaluation of each of its apportionment factors. In its further revisions, Southwestern shall reformulate its apportionment methods for these common cost pool within Accounts 6211 and 6112. The reformulated methods shall be stated clearly, in terms that the manual defines. They shall be accompanied by detailed showings as to why they would accurately apportion the pools between regulated and nonregulated activities.

Account 2681 - Capital Leases

44. In the *Southwestern Order*, we determined that Southwestern had failed to make clear its apportionment method for this account, and we ordered Southwestern to explain that method.[86] While the December 30 manual generally explains Southwestern's method, several problems remain.

45. First, Southwestern proposes to employ an "account transaction analysis" to assign its investment in leased buildings to cost pools.[87] Southwestern states that this analysis will involve a review of ledger entries or continuing property record reports,[88] but does not state how Southwestern intends to use those records to assign its investment in leased buildings to cost pools. Southwestern shall describe its procedures in this regard in its further revisions. If those procedures are not identical to the procedures we suggest for Southwestern's investment in owned buildings,[89] Southwestern shall justify them in detail in its further revisions.[90]

46. Second, the cost pools Southwestern intends to create for its investment in leased buildings and the apportionment factors Southwestern intends to apply to those cost pools are similar to those Southwestern proposed for its investment in owned buildings. Consistent with our treatment of that investment,[91] we require Southwestern to explain in detail why its cost pool structure and apportionment factors for investment in leased buildings would result in an accurate apportionment of that investment between regulated and nonregulated activities.

47. Finally, the December 30 manual proposes apportionment methods for investment in leased general purpose computers and leased motor vehicles that are markedly different from the methods that manual proposes for investment in owned general purpose computers and owned motor vehicles."[92] The manual, however, states no reason for these divergent treatments. In its further revisions, Southwestern shall justify in detail its apportionment methods for leased general purpose computers and leased motor vehicles to the extent those methods differ from the apportionment methods the December 30 manual lists for owned general purpose computers and owned motor vehicles.[93]

Account 2682 - Leasehold Improvements

48. Southwestern's December 30 manual proposes to create cost pools for central office leasehold improvements, distribution services and station connections leasehold improvements, and administrative office space leasehold improvements within this account. Each of these pools would be apportioned in proportion to the apportionment of the corresponding cost pool within Account 2121.[94] We believe that improvements made to leased property have little to do with investment in owned property.[95] We also believe that Southwestern makes leasehold improvements to support its property subject to capital leases and may also make leasehold improvements to support property rented from others under operating leases. Accordingly, we require Southwestern to clarify this matter in its further revisions. If Southwestern makes leasehold improvements solely to support property subject to capital leases, Southwestern shall apportion each of these cost pools within Account 2682 in proportion to the apportionment of the corresponding cost pool or pools that Southwestern's further revisions list for Account 2681.[96] If Southwestern also makes leasehold improvements to support property rented from others under op-

erating leases, Southwestern shall develop apportionment factors for these cost pools within Account 2682 that reflect that practice.

Account 2690 - Intangibles

49. Southwestern's December 30 manual lists three cost pools for this account. Two of these pools are being directly assigned to regulated and nonregulated activities. Southwestern proposes to apportion the third pool in proportion to the overall apportionment of the directly assigned pools.[97] We believe that there may be no cost causal connection between intangibles that support both regulated and nonregulated activities and intangibles that can be associated with an exclusively regulated or an exclusively nonregulated function. Accordingly, we require Southwestern to describe the causes of the investment included in its common cost pool in this account and to propose an apportionment factor for this pool that reflects those causes.

Account 3100 - Accumulated Depreciation

50. Southwestern's initial manual proposed no apportionment method for this account. After the American Telephone and Telegraph Company (AT&T) objected to that exclusion, Southwestern specified that it would apportion its accumulated depreciation based on the corresponding plant in service.[98] In the *Southwestern Order*, we determined that this apportionment method was inconsistent with the Commission's determination in the *Joint Cost Order* that depreciation reserve amounts should be apportioned at the level of specificity maintained for investment accounts.[99] We ordered Southwestern to apportion its accumulated depreciation "on an investment-account-by-investment-account basis."[100] We also specified that Southwestern must propose unambiguous and understandable cost pool assignment and apportionment methods for this account.[101]

51. In its December 30 manual, Southwestern states that it will establish a separate cost pool within Account 3100 "for each of the major plant accounts."[102] The manual, however, lists only three cost pools for this account: a pool that is to be directly assigned to regulated activities, a pool that is to be directly assigned to nonregulated activities, and a common pool.[103] Southwestern states that it will assign its accumulated depreciation to these pools "in the same proportion as the related plant investment, Account 2001, Telecommunications Plant in Service" and it will apportion the common pool "in the same proportion as investment for Telecommunications Plant in Service, Accounts 2111 through 2690."[104]

52. We find that Southwestern has failed to comply with our requirements that it propose an apportionment method for Account 3100 that is unambiguous, understandable, and consistent with the Commission's requirement that depreciation reserve amounts should be apportioned at the level of specificity maintained for investment accounts. To eliminate these problems and to ensure that Southwestern apportions this account on a cost causative basis, we require Southwestern to list within its cost table each cost pool that it intends to create within this account. Beside each cost pool listing, Southwestern shall list the corresponding investment account cost pool or pools. For each depreciation pool, Southwestern shall propose an apportionment method that reflects the relative apportionment of the corresponding investment cost pool or pools.[105] No accumulated depreciation cost pool shall correspond to more than one account or to cost pools within more than one account, unless the corresponding cost pools share identical apportionment factors. Finally, if any cost pool within Account 3100 is to be assigned directly to regulated or nonregulated activities, Southwestern shall specify that the investment to which that cost pool relates will be excluded from the calculation of the apportionment factors for its shared cost pools within this account.[106]

Account 5301 - Uncollectible Revenue - Telecommunications, Account 5302 - Uncollectible Revenue - Other, and Account 7991 - Other Nonregulated Revenues

53. In the *Southwestern Order*, we required Southwestern to include apportionment proposals for Accounts 5301 and 5302 in its revisions.[107] In response, the December 30 manual lists these accounts as well as Account 7991. Southwestern proposes to divide Account 5301 into a regulated and a nonregulated pool. Southwestern states that it will "multiply[] nonregulated revenue times nonregulated uncollectible factor" to assign costs to the nonregulated pool and that the regulated pool will consist of the difference between the account balance and the amount assigned to the nonregulated pool.[108] Southwestern also proposes to assign Account 5302 directly to regulated activities and Account 7991 directly to nonregulated activities.[109] The manual, however, neither defines Southwestern's "nonregulated uncollectible factor" nor explains why Account 5302 is being assigned to regulated activities.

54. Although Southwestern's use of Account 7991 appears consistent with the Commission's present accounting rules, the *Further Reconsideration Order* deleted Account 7991 and added Account 5280 - Nonregulated operating revenue.[110] Those rule changes will become effective on May 22, 1989. In the *Further Reconsideration Order*, the Commission also determined that it is essential to our monitoring efforts that cost manuals list any account in which carriers record revenues derived from nonregulated activities to which the manual apportions costs.[111] Therefore, Southwestern must list Account 5280 in its further revisions.

55. It is also essential that the manual specify all the procedures Southwestern employs to divide uncollectible revenue among its revenue accounts and to apportion those accounts between regulated and nonregulated activities. Therefore, we require that Southwestern describe those procedures in detail in its further revisions. The description shall make clear that Southwestern apportions uncollectible revenue related to telecommunications activities in proportion to relative telecommunications revenue and uncollectible revenue related to non-telecommunications activities in proportion to relative non-telecommunications revenue.[112]

Account 6116 - Other Work Equipment Expense

56. Southwestern's December 30 manual lists a "Common Tools" cost pool and a "Special Tools Distribution Services" cost pool within this account. Southwestern proposes to apportion these pools in proportion to "Account 2116-60C, Other Work Equipment - Tools and Other Work Equipment" and "Account 2116-253C, Other Work Equipment - Special Tools and Work Equipment," respectively.[113] Southwestern neither explains these apportionment factors nor attempts to show why they might

produce an accurate apportionment of Southwestern's other work equipment expense between regulated and nonregulated activities.

57. The problems in regard to these cost pools are similar to the problems we discuss in relation to Southwestern's common switching expenses. Consistent with our treatment of those switching expenses,[114] we require Southwestern to reformulate its apportionment methods for other work equipment expenses. The reformulated methods shall be stated clearly, in terms that the manual defines. They shall be accompanied by detailed showings as to why they would accurately apportion other work equipment expenses between regulated and nonregulated activities.

Account 6121 - Land and Building Expense

58. In its initial manual, Southwestern proposed to assign all its land and buildings expenses, other than those for equal access and network reconfiguration, to a single cost pool. That manual indicated that this pool would be apportioned based on relative wages and salaries when no other apportionment method was available. After AT&T challenged that apportionment method, we required Southwestern to clarify it. We suggested that Southwestern should apportion land and building expenses related to network plant in proportion to the associated investment and other land and building expenses in proportion to the associated wages and salaries. We also required Southwestern to create a cost pool for rent expense that would be apportioned in proportion to the relative use of the rented space or to justify in its revisions why such a cost pool should not be mandated.[115]

59. In its December 30 manual, Southwestern proposes to divide this account into three cost pools. According to that manual, one pool that includes "rental payments incurred under the terms of the MFJ [Modified Final Judgment] for shared network facilities" would be directly assigned to regulated activities.[116] We believe that these shared network facilities, like other parts of Southwestern's network, may support both regulated and nonregulated activities. Therefore, we require Southwestern to clarify the nature of these network facilities in its further revisions. If these facilities support both regulated and nonregulated activities, Southwestern shall propose a new apportionment method for the associated rental expenses and show in its further revisions why that method would result in an accurate apportionment of those costs.

60. The pool that the December 30 manual proposes to assign directly to regulated activities also includes "rental payments for space as required in the conduct of any antitrust suit."[117] This direct assignment is improper because it encompasses rental expenses incurred in the conduct of antitrust suits arising from Southwestern's nonregulated activities. In its further revisions, Southwestern shall specify that rental expenses incurred in the conduct of antitrust suits will be directly assigned to regulated activities only to the extent the suits arise from Southwestern's regulated activities. In addition, Southwestern shall clarify whether it incurs rental expenses in connection with antitrust suits arising from its nonregulated activities. If Southwestern incurs such expenses, it shall create a cost pool for them in its further revisions and directly assign that pool to nonregulated activities.

61. The second cost pool that the December 30 manual lists for Account 6121 is the rental expense pool that we required Southwestern to create. The manual states that this pool will be apportioned in proportion to the relative use of the rented space, as determined in an annual study of rented space. Southwestern indicates that this study will be based on property records and will be similar to the space usage study Southwestern conducts for its owned buildings.[118] Consistent with our treatment of that investment,[119] we require Southwestern to amend its manual to specify that it will use square footage ratios calculated and applied on a building-by-building basis to apportion its rental expenses.[120]

62. Southwestern uses its study of owned buildings to assign building investment to cost pools, and it appears that Southwestern may be using its study of rented buildings in the same way. If so, Southwestern must list, in its further revisions, each cost pool that it intends to create for rental expenses as well as apportionment factors for each of those pools. If this is not the case, the further revisions must describe in detail each step that Southwestern intends to make to apportion building rental expenses, and show how those steps would result in the accurate apportionment of those expenses between regulated and nonregulated activities.

63. The third cost pool the December 30 manual lists for building expense is a common pool that Southwestern proposes to apportion in proportion to the aggregate apportionment of its central office, distribution services, and station connections cost pools within Account 2121.[121] We find this proposal defective, because it implicitly assumes that none of the expenses in this pool vary with building function and that expenses related to rented land and buildings are proportionate to investment in owned land and buildings.[122] Since the December 30 manual provides no support for these assumptions,[123] we require Southwestern to describe the expenses in this pool and to demonstrate which, if any, of them vary with building function. In addition, if this cost pool includes either expenses that vary with building function or expenses related to rented land and buildings, Southwestern shall propose a new apportionment method for this pool that reflects the nature of those expenses. If that new method does not include separate cost pools, paralleling those that the further revisions list for Account 2121, for expenses that vary with building function, Southwestern shall justify it in detail in its further revisions.

Account 6124 - General Purpose Computers Expense

64. Because Southwestern's initial manual did not set forth an apportionment method for this account, we required Southwestern to propose such a method.[124] The December 30 manual proposes three cost pools within this Account: a regulated pool, a nonregulated pool, and a "Support" pool that is to be apportioned between regulated and nonregulated activities. Southwestern states that this "Support" pool will consist of the "Account 6124 balance, less amount assigned direct to the regulated cost pool".[125] This assignment method is incorrect, because it ignores the existence of the nonregulated pool. In its further revisions, Southwestern shall specify that this "Support" pool will consist of the Account 6124 balance less the amounts assigned to the regulated and nonregulated cost pools.

Account 6311 - Station Apparatus Expense

65. In its initial manual, Southwestern proposed to assign all the costs in this account directly to regulated activities. In the *Southwestern Order*, we stated that this proposal appeared inconsistent with Southwestern's proposal to assign a portion of the related investment directly to nonregulated activities. We required that Southwestern either revise or justify its proposed treatment of station apparatus expense.[126] The December 30 manual proposes three cost pools within Account 6311: a "Direct" pool that would be directly assigned to regulated activities and two "Direct" pools that would be directly assigned to nonregulated activities. Southwestern states that costs will be assigned to the regulated pool and to one of the nonregulated pools "in the same proportion as the investment, Account 2311, Station Apparatus".[127] Southwestern states further that it will use field reporting codes to assign costs to the other nonregulated pool. That pool, according to the manual, consists of maintenance expense associated with customer-owned customer premises equipment (CPE).[128]

66. We find no logic to or justification for the apportionment method Southwestern proposes for this account. If Southwestern retains this method in its further revisions, it must explain and justify each aspect of that method in detail. In addition to stating precisely how Southwestern intends to calculate proportionate investment for its regulated and first nonregulated cost pool within this account,[129] that explanation and justification shall state why Southwestern does not employ field reporting codes to assign all its station apparatus expense to cost pools.

Account 6362 - Other Terminal Equipment Expense

67. Southwestern's initial manual proposed nineteen cost pools within this account. In its comments on that manual, AT&T challenged Southwestern's proposal to assign one of these pools, for "CPE Repair-IPW-Trouble Isolation and Travel-Time Sensitive Charge[s]," 50% to regulated and 50% to nonregulated activities.[130] In its reply to AT&T, Southwestern stated that this pool consisted of "the travel time, trouble isolation and repair service bureau expenses, that results [sic] when trouble is found on the customers [sic] side of the network interface".[131] Southwestern asserted that the 50/50 allocation was reasonable because "[w]hen a trouble report is issued and a repairman dispatched, the repairman is testing both the network and the customer's premises wire at the same time".[132] In the *Southwestern Order*, we did not require Southwestern to revise that method, because it affected only one cost pool in a large account.[133] However, we ordered Southwestern to explain and simplify its overall apportionment method for this account.[134]

68. In its December 30 manual, Southwestern proposes to use functional accounting codes to divide this account into regulated, nonregulated, and trouble isolation cost pools. Although Southwestern does not describe the contents of the regulated pool, the manual indicates that the nonregulated pool consists of "[n]onregulated maintenance incurred on customer owned other terminal equipment" and that the trouble isolation pool consists of "[i]nstallers' travel to the customers' premises as well as trouble isolation efforts resulting from customer trouble reports".[135] The December 30 manual proposes that this latter pool be divided equally between regulated and nonregulated activities.

69. While the information the December 30 manual provides regarding Southwestern's apportionment method for other terminal equipment expense falls far short of explaining that method fully, that information is sufficient to establish the method's insufficiency. Southwestern's nonregulated activities include the installation and maintenance of inside wiring,[136] and Southwestern records the costs of those services in Account 6362. Southwestern should be apportioning all costs that it incurs in installing or maintaining inside wiring to nonregulated activities, including costs incurred in connection with company-owned inside wiring. Southwestern, however, proposes to apportion only "[n]onregulated maintenance incurred on customer owned other terminal equipment" and part of its trouble isolation cost pool to nonregulated activities. That proposal fails to reflect the causes of Southwestern's other terminal equipment expenses. Therefore, we require Southwestern to reformulate its overall apportionment method for Account 6362 and to show, in its further revisions, precisely how its accounting and cost apportionment procedures for its inside wiring operations will result in the apportionment to nonregulated activities of all its current inside wiring costs.[137]

70. As part of its showing, Southwestern shall specifically address its treatment of travel and trouble isolation costs. We recognize, of course, that Southwestern's current proposal for those costs reflects our prior decision not to require a new apportionment factor for the "CPE Repair-IPW-Trouble Isolation and Travel-Time Sensitive Charge[s]" pool Southwestern included in its initial manual. That proposal, however, is inconsistent with our recent discussion of this area in the *1989 Access Tariff Order*.[138] We believe that Southwestern should revise its apportionment methods for travel and trouble isolation costs in accordance with that Order, and we require Southwestern to do so.

Account 6533 - Testing Expense

71. In its December 30 manual, Southwestern lists a cost pool within this account that "[i]ncludes costs of handling customer generated trouble reports for single/multiple line key and non-key station equipment and non-designed services".[139] Southwestern proposes to assign 50% of this pool directly to regulated activities. The remainder of the pool, according to Southwestern, would be apportioned between regulated and nonregulated activities based on trouble reports.[140] Southwestern makes no attempt to justify this apportionment method, even though it differs from the method the initial manual proposed.

72. We find Southwestern's apportionment method for this cost pool totally inadequate absent a detailed showing as to why the method might accurately apportion Southwestern's testing expenses between regulated and nonregulated activities. In its further revisions, Southwestern shall either provide such a showing or propose a new apportionment method, that reflects the causes of Southwestern's testing expenses, for this cost pool.[141]

Account 6535 - Engineering Expense

73. In its initial manual, Southwestern proposed to apply the general allocator to this entire account. After AT&T challenged that proposal, we required Southwestern to apportion this account in proportion to the aggregate apportionment of the assets that this engineering expense supports.[142] In its December 30 manual, Southwestern divides this account into regulated, nonregulated,

and common cost pools, and proposes to apportion the common pool in proportion to the "[r]elative investment value of Account 2121, 2123, 2124, and Account 2211 through 2441".[143] Southwestern indicates that the regulated pool consists of expenses that support equal access and network reconfiguration investment, but does not describe the contents of the nonregulated pool.[144]

74. While the disaggregation of Southwestern's engineering expense into three cost pools should increase the accuracy of Southwestern's apportionment results, we believe that the apportionment factor Southwestern proposes for the common pool fails to match expenses with the investment they support.[145] Accordingly, we require that Southwestern either state in its further revisions that its apportionment factor calculations for the common pool within Account 6535 exclude apportionment results for all investment associated with engineering expenses that are assigned to the regulated and nonregulated pools within that account or explain in detail why such an exclusion should not be mandated.[146]

Account 6561 - Depreciation Expense - Telecommunications Plant in Service

75. The apportionment method Southwestern's December 30 manual proposes for this account is similar to the method that manual proposes for Account 3100, and is similarly deficient.[147] To eliminate the deficiencies, we require that Southwestern create a cost pool within Account 6561 corresponding to each cost pool within Account 3100 for which it incurs depreciation expense.[148] The further revisions shall list each of these cost pools within Account 6561. Each cost pool listing shall be accompanied by information similar to that which we have specified for Account 3100.[149]

Account 6613 - Product Advertising

76. Southwestern's initial manual divided this account into numerous cost pools, all of which were to be directly assigned to regulated or nonregulated activities. In the *Southwestern Order*, we ordered Southwestern to consolidate these pools to the extent possible and to apportion one of the pools, for "general advertising of network and nonnetwork services" between regulated and nonregulated activities.[150] In response, the December 30 manual proposes a new cost pool structure that would assign Southwestern's product advertising expense to regulated, nonregulated, general advertising, and support cost pools. Southwestern states that it will apply its marketing allocator to the general advertising pool and will apportion the support pool in proportion to the aggregate apportionment of the regulated and nonregulated pools within this account.[151]

77. While it appears appropriate to apply the marketing allocator to the general advertising cost pool, Southwestern does not make clear whether the support pool supports the product advertising functions reflected in the general advertising pool as well as the product advertising functions reflected in the regulated and nonregulated pools.[152] Southwestern shall clarify this matter in its further revisions. If this support pool supports Southwestern's general advertising functions, Southwestern must disaggregate the pool into separate pools for product specific support and general advertising support.[153] As apportionment factors for these pools, Southwestern could use the factor its December 30 manual lists for the support pool and the marketing allocator, respectively.

Account 6623 - Customer Services

78. In the *Southwestern Order*, we required Southwestern to reformulate its apportionment method for this account.[154] Several aspects of Southwestern's reformulated proposals warrant discussion.

79. First, in its December 30 manual, Southwestern states that it will perform a customer services operations study to develop an apportionment factor for its service order cost pool.[155] Southwestern indicates that this study employs a statistically designed procedure to sample the functions Southwestern's business office performs in selected service centers. While the manual states that "management judgment" will determine the service centers to be studied,[156] Southwestern does not reveal the criteria to be employed in this judgment. It shall do so in the further revisions.[157]

80. Second, Southwestern states that its customer services operations study will determine the relative percentages of time, on average, Southwestern's business office personnel spend on regulated and nonregulated activities.[158] Southwestern, however, has not made clear whether the costs of all the functions being studied and no other costs are to be assigned to its service order cost pool.[159] Southwestern shall clarify this matter in its further revisions. If the functions being studied and the functions whose costs are to be assigned to this cost pool are not identical, Southwestern must revise its overall apportionment method for customer service operations to reflect this study.

81. Third, the December 30 manual proposes to apportion Southwestern's billing cost pool within Account 6623 in proportion to "the ratio of nonregulated lines appearing on a bill, to the total number of lines appearing on a bill".[160] While relative billing lines is an appropriate apportionment factor for billing costs,[161] Southwestern's method incorrectly assumes that all billing lines are either exclusively regulated or exclusively nonregulated. In its further revisions, Southwestern shall propose an apportionment method for this pool that apportions common billing lines between regulated and nonregulated activities in proportion to the ratio of billing lines that are exclusively regulated to billing lines that are exclusively either regulated or nonregulated.

Account 6725 - Legal

82. In its initial manual, Southwestern proposed to apply the general allocator to this entire account. In the *Southwestern Order*, we rejected that proposal. We required Southwestern to disaggregate this account into regulated, nonregulated, overhead, and residual cost pools.[162] Despite that requirement, Southwestern's December 30 manual lists no overhead cost pool for this account.[163] Southwestern shall list such a cost pool in its further revisions. This cost pool shall be apportioned in proportion to the relative apportionment of the regulated and nonregulated cost pools, as specified in the *Southwestern Order*.[164]

Account 6726 - Procurement

83. Southwestern's initial manual proposed to apply the general allocator to this entire account. In the *Southwestern Order*, we rejected that proposal and required Southwestern to apportion its procurement expense on a cost causative basis.[165] While the treatment of procurement expense in the December 30 manual is generally consis-

tent with cost causality, Southwestern proposes to apportion its central office equipment (COE) cost pool in proportion to "[r]elative actual usage of Central Office equipment, Accounts 2211 through 2232.[166] Southwestern does not state how it intends to calculate relative actual usage of this equipment. However, the manual describes this pool as "[i]ncluding procurement expenses for COE stock and non-stock materials".[167]

84. Southwestern's description implies that this COE cost pool includes procurement expenses related to COE construction projects. Therefore, we believe that Southwestern's proposal to apportion this pool in proportion to relative actual usage of COE is inconsistent with the normal practice within the telecommunications industry of constructing plant to meet forecast, rather than current, demand.[168] Therefore, we require that Southwestern either justify this apportionment factor in detail or propose an apportionment factor for its COE pool within Account 6726 that reflects this construction policy. If the Southwestern continues to employ an apportionment factor based on relative actual usage, it must define precisely how it intends to calculate such usage.

Account 7140 - Gains and Losses from Foreign Exchange

85. In its initial and December 30 manuals, Southwestern assigns this account directly to regulated activities.[169] Although the *Southwestern Order* did not address this apportionment method, we now believe that it is inappropriate to assign all of Southwestern's gains and losses from the exchange of foreign currency directly to regulated activities. Since Southwestern engages in both regulated and nonregulated activities, at least part of these gains and losses should be apportioned to nonregulated activities. Southwestern shall provide for such an apportionment in its further revisions.[170]

Account 7150 - Gains and Losses from Disposition of Land and Artworks

86. In its initial manual, Southwestern proposed to assign this account directly to regulated activities. Since Southwestern's land and artworks support nonregulated as well as regulated activities, we required Southwestern to apportion this account between regulated and nonregulated activities. We directed Southwestern to analyze specific entries to this account in performing that apportionment.[171] Despite that directive, Southwestern's December 30 manual proposes to apportion this account in proportion to the "[r]elative investment value in Account 2111, Land, and Account 2122-71C, Artworks.[172] This apportionment factor is inconsistent with both the *Southwestern Order* and with the Commission's requirement that gains and losses from the disposition of land and artworks be included in the interstate rate base in proportion to the relative inclusion of the costs of the land and artworks during the periods in which they were in service.[173] In its further revisions, Southwestern shall propose an apportionment method for this account that employs an analysis of each entry to this account to apportion these gains and losses in accordance with Commission requirements.

Account 7240 - Operating Other Taxes

87. In its initial manual, Southwestern proposed to apportion its gross receipt taxes "by dividing nonregulated revenue by total revenue".[174] Although we approved that proposal, the December 30 manual proposes to assign those taxes directly to regulated activities.[175] Southwestern presents no reason for this proposed change. We believe that Southwestern continues to pay gross receipt taxes on both regulated and nonregulated revenue. Therefore, we require Southwestern to reinstate the apportionment method for these taxes proposed in its initial manual.

III. ORDERING CLAUSES

88. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communication's Act of 1934, as amended, 47 U.S.C. §154(i), that the December 30, 1989 revisions to Southwestern's Cost Allocation Manual ARE APPROVED, subject to the conditions stated in this Order.

89. IT IS FURTHER ORDERED that the revisions required herein shall be filed no later than May 31, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Separation of Costs of Regulated and Nonregulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, CC Docket 86-111, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *recon.*, 2 FCC Rcd 6238 (1987) (*Reconsideration Order*), *further recon.*, 3 FCC Rcd 6701 (1988)(*Further Reconsideration Order*), *petition for review pending*, Southwestern Bell Corp. v. FCC, D.C. Circuit No. 87-1764 (filed Dec. 14, 1987).

[2] Southwestern Bell Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 447 (1988) (*Southwestern Order*).

[3] *Id.* at 447, paras. 2-3; *id.* at 460-61, para. 116.

[4] Southwestern also filed Errata to its December 30, 1988 filing. *See* Letter from Karen Rogers, Director-Federal Regulatory, Southwestern Bell Corporation, to Donna Searcy, Secretary, FCC (filed Jan. 4, 1989). We consider the Errata to be part of the December 30 filing.

[5] Letter from Melanie S. Fannin, General Attorney, Southwestern Bell Telephone, to H. Walker Feaster, Acting Secretary, FCC, at 1 (Mar. 29, 1988).

[6] We express no opinion regarding those portions of the March 29, June 30, and September 30 revisions that the December 30 manual does not retain.

[7] Southwestern may consolidate its June 30, 1989 quarterly update, if any with this filing.

[8] *Southwestern Order*, 3 FCC Rcd at 447, para. 3.

[9] With regard to any revisions that Southwestern claims it cannot make retroactively, we reserve the right to require either retroactivity or subsequent adjustments to reflect the impact of the lack of retroactivity on operations during 1988 and the first part of 1989.

[10] *Southwestern Order* 3 FCC Rcd at 448, para. 9; *id.* at 451-53, paras. 39-51; *see also Joint Cost Order*, 2 FCC Rcd at 1317-19, paras. 147-64.

[11] *Southwestern Order*, 3 FCC Rcd at 451-53, paras. 39-51.

[12] *See id.* at 448, para. 9; *id.* at 453, para. 51.

[13] MCI Comments at 3-5.

[14] *Id.* at 5.

[15] *Id.* at 5-8.

[16] Southwestern Reply at 1-2.

[17] *Id.*

[18] *See Reconsideration Order*, 2 FCC Rcd at 6305, para. 191.

[19] *See Joint Cost Order*, 2 FCC Rcd at 1355, n.390; *accord Reconsideration Order*, 2 FCC Rcd at 6305, para. 191.

[20] *Compare Joint Cost Order*, 2 FCC Rcd at 1355, n.390 (level of detail is comparable to that in Separations Manual, not that in the former Division of Revenues procedures).

[21] *See* Annual 1989 Access Tariff Filings, DA 89-337, slip op. at 19-31, paras. 51-86 (released Mar. 22, 1989)(*1989 Access Tariff Order*).

[22] *See Joint Cost Order*, 2 FCC Rcd at 1333, para. 274.

[23] *Id.* at 1329, para. 242; *id.* at 1334, para. 283.

[24] *See id.* at 1333, para. 274.

[25] *Southwestern Order*, 3 FCC Rcd at 448-49, paras. 11-15.

[26] *Joint Cost Order*, 2 FCC Rcd at 1328, para. 240.

[27] *Southwestern Order*, 3 FCC Rcd at 449, para. 15.

[28] *See* Letter from Melanie S. Fannin, General Attorney, Southwestern Bell to H. Walker Feaster, Acting Secretary, Federal Communications Commission, at 2 (filed Mar. 29, 1988).

[29] *Id.*, n.5.

[30] *Southwestern Order*, 3 FCC Rcd at 448-49, paras. 13-15.

[31] Southwestern December 30 Manual, §3 at 2, 20.

[32] *See Joint Cost Order*, 2 FCC Rcd at 1336, para. 299; *see also* U S West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 4 FCC Rcd 481, 484, para. 32 (1988)(*U S West Compliance Order*).

[33] *Southwestern Order*, 3 FCC Rcd at 454, para. 56.

[34] Southwestern December 30 Manual, §3 at 4.

[35] *Id.*, §3 at 11.

[36] *See* U S West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 195, 201-02, paras. 56-58 (1988) (*U S West Order*).

[37] Southwestern December 30 Manual, §3 at 7-8.

[38] *Id.*, §3 at 14.

[39] *Id.*, §3 at 16.

[40] *Id.*, §2 at 4.

[41] *Id.*, §3 at 29.

[42] *Id.*, §3 at 33.

[43] *See U S West Compliance Order*, 4 FCC Rcd at 486, paras. 43-45.

[44] Southwestern Initial Manual, §2 at 1-2.

[45] *Id.*

[46] *Southwestern Order*, 3 FCC Rcd at 449, para. 17.

[47] Southwestern Revised Manual, §2 at 1-8.

[48] *Id.*, §2 at 4.

[49] *Id.* Paragraph 21, *supra*, also discusses these leasing services.

[50] *See Joint Cost Order*, 2 FCC Rcd at 1308, paras. 77-78.

[51] Southwestern December 30 Manual, §2 at 6-7.

[52] *Southwestern Order*, 3 FCC Rcd at 449, paras. 22.

[53] Southwestern December 30 Manual, §4 at 7.

[54] *Compare Joint Cost Order*, 2 FCC Rcd at 1322, para. 187 (administrative activities classified as nonproductive time).

[55] Southwestern December 30 Manual, §4 at 8.

[56] *Southwestern Order*, 3 FCC Rcd at 453, paras. 51-52.

[57] *E.g.*, Southwestern December 30 Manual, §6 at 14 (Account 3100 - Accumulated depreciation); *id.*, §6 at 22 (Account 6124 - General purpose computers expense).

[58] *Id.*, §6 Introduction at 6.

[59] *Id.*, §6 at 3-4; *see also id.*, §6 Introduction at 12.

[60] *Id.*

[61] *See* Bell Atlantic Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 4 FCC Rcd 496, 502, para. 54 (1988)(*Bell Atlantic Compliance Order);* BellSouth Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 6954, 6957, para. 23 (1988)(*BellSouth Compliance Order).*

[62] We are not addressing Southwestern's apportionment methods for Accounts 2004 - Telecommunications plant under construction - long term, 2005 - Telecommunications plant adjustment, 2006 - Nonoperating plant, and 2007 - Goodwill. With the exception of investment in Account 2005 that the Commission specifically permits a carrier to include, all investment in those accounts is excluded from the interstate rate base. *See* Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, 3 FCC Rcd 269, 272-73, paras. 28-32 (1987)(*Rate Base Order), recon.*, FCC 89-30 (released Feb. 22, 1989).

[63] *Southwestern Order*, 3 FCC Rcd at 448, para. 7; *id.* at 451-52, para. 39.

[64] Southwestern December 30 Manual, §6 Introduction at 5.

[65] *Southwestern Order*, 3 FCC Rcd at 455, para. 66.

[66] *Id.*

[67] Southwestern December 30 Manual, §6 at 7.

[68] *See* Southwestern Bell Telephone Company, 1989 Tariff Review Plan, Transmittal No. 1757, COS-7(H)(Dec. 30, 1988).

[69] *See Joint Cost Order*, 2 FCC Rcd at 1319, paras. 164-66.

[70] Southwestern December 30 Manual, §6 at 5.

[71] *Id.*, §6 Introduction at 12.

[72] *See U S West Compliance Order*, para. 64.

[73] Southwestern December 30 Manual, §6 at 5.

[74] *Id.*, §6 Introduction at 5.

[75] *See* para. 33, *supra*.

[76] *See* para. 36, *supra*.

[77] Southwestern December 30 Manual, §6 at 7.

[78] *BellSouth Compliance Order*, 3 FCC Rcd at 6957, para. 23.

[79] Southwestern December 30 Manual, §6 at 7.

[80] This lack of objection is, of course, subject to Southwestern's justifying the retention of this pool in its further revisions. *See* para. 35, *supra*.

[81] *Southwestern Order*, 3 FCC Rcd at 451-53, paras. 38-51; *id.* at 455-56, paras. 69-71.

[82] *See* Southwestern December 30 Manual, §5 at 1-4.

[83] *Id.*, §6 at 9.

[84] *Id.*, §6 at 22.

[85] *Southwestern Order*, 3 FCC Rcd at 453, paras. 51-52.

[86] *Id.* at 456, para. 75.

[87] Southwestern December 30 Manual, §6 at 12.

[88] *Id.* §6 Introduction at 4.

[89] *See* paras. 34-39, *supra*.

[90] *Bell Atlantic Compliance Order*, 4 FCC Rcd at 508, para. 63.

[91] *See* paras. 34-39, *supra*.

[92] *Compare* Southwestern December 30 Manual, §6 at 12 *with id.*, §6 at 6, 8.

[93] *See U S West Compliance Order*, 4 FCC Rcd 489, para. 72.

[94] Southwestern December 30 Manual, §6 at 13.

[95] *U S West Compliance Order*, 4 FCC Rcd at 489-90, paras. 73-75; Nevada Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs and Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 7081, 7087, para. 58 *(1988) (Nevada and Pacific Compliance Order)*

[96] *See generally U S West Compliance Order*, 4 FCC Rcd at 490, para. 75.

[97] Southwestern December 30 Manual, §6 at 13.

[98] Southwestern October 19, 1987 Reply, Appendix 1 at 1 & Appendix 2 at 8.

[99] *Southwestern Order*, 3 FCC Rcd at 456, para. 77; *see also Joint Cost Order*, 2 FCC Rcd at 1326, paras. 217-20.

[100] *Southwestern Order, 3* FCC Rcd at 456, para. 77

[101] *Id.* at 448, para. 9; *id.* at 453, para. 51.

[102] Southwestern December 30 Manual, §6 at 14.

[103] *Id.* The manual refers to this common pool as both a "cost pool" and as "Accumulated Depreciation Cost Pools." *Id.*

[104] *Id.*

[105] *Bell Atlantic Compliance Order*, 4 FCC Rcd at 503, para. 66.

[106] *Nevada and Pacific Compliance Order*, 4 FCC Rcd at 7088, para. 60.

[107] *Southwestern Order*, 3 FCC Rcd at 453-54, para. 54.

[108] Southwestern December 30 Manual, §6 at 19; *see id.*, §6 Introduction at 8.

[109] *Id.*, §6 at 19, 42.

[110] *Further Reconsideration Order*, 3 FCC Rcd at 6702, para. 12.

[111] *Id.* at 6709, n.10.

[112] *See U S West Order*, 3 FCC Rcd at 206, para. 104.

[113] Southwestern December 30 Manual, §6 at 20.

[114] *See* para. 43, *supra*.

[115] *Southwestern Order*, 3 FCC Rcd at 457, para. 78.

[116] Southwestern December 30 Manual, §6 at 21.

[117] *Id.*, §6 at 21.

[118] *Id.*, §6 Introduction at 14; *id.*, §6 at 21.

[119] *See* para. 36, *supra*.

[120] *See Nevada and Pacific Compliance Order*, 4 FCC at 7088, para. 62.

[121] Southwestern December 30 Manual, § 6 at 21.

[122] Southwestern states that its rental pool "represents rents paid for the use of land or space in buildings." *Id.*

[123] Southwestern's description of the contents of this pool consists of a statement that the pool "[i]ncludes expenses such as electrical, power, fuel, etc." *Id.*

[124] *Southwestern Order*, 3 FCC Rcd at 457, para. 79.

[125] Southwestern December 30 Manual, §6 at 22.

[126] *Southwestern Order*, 3 FCC Rcd at 457, para. 80; *see also id.* at 456, para. 72.

[127] Southwestern December 30 Manual, §6 at 23.

[128] *Id.*

[129] *See* para. 31, *supra*.

[130] AT&T Comments at 7.

[131] Southwestern October 19, 1987 Reply, Appendix 1 at 4-5.

[132] *Id.*

[133] *Southwestern Order*, 3 FCC Rcd at 457, para. 81.

[134] *Id.* at 451-53, paras. 40-51.

[135] Southwestern December 30 Manual, §6 at 24.

[136] *Id.*, §5 at 1.

[137] *See, e.g.*, NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 5978, para. 40 *(1988)(NYNEX Compliance Order)*.

[138] *1989 Access Tariff Order*, slip op. at 23-28, paras. 62-75.

[139] Southwestern December 30 Manual, §6 at 27.

[140] *Id.*

[141] *See Nevada and Pacific Compliance Order*, 4 FCC Rcd at 7084, para. 32.

[142] *Southwestern Order*, 3 FCC Rcd at 457, para. 85.

[143] Southwestern December 30 Manual, §6 at 28.

[144] *See id.*

[145] For instance, Southwestern's apportionment factor for the common pool includes equal access and network reconfiguration investment recorded in Account 2121 - Buildings, even though Southwestern is assigning the engineering expenses that support that investment to its regulated cost pool within Account 6535. *See* Southwestern December 30 Manual, §6 at 7.

[146] *BellSouth Compliance Order*, 3 FCC Rcd at 6957, para. 23.

[147] *Compare* Southwestern December 30 Manual, §6 at 28 *with id.*, §6 at 14. We note that although Southwestern states that it will apportion part of Account 6561 "on an account-by-account basis," id., §6 at 28, Southwestern's cost pool structure and overall apportionment methods do not reflect that statement.

[148] *Nevada and Pacific Compliance Order*, 4 FCC Rcd at 7088, para. 60.

[149] *See* para. 52, *supra*.

[150] *Southwestern Order*, 3 FCC Rcd at 452, para. 43; *id.* at 458, para. 90.

[151] Southwestern December 30 Manual, §6 at 31-32.

[152] *Id.* at 32.

[153] Southwestern may use the proportionate amounts recorded in the regulated and nonregulated pools and the general advertising pool, or any other appropriate cost pool assignment method, to perform this this disaggregation.

[154] *Southwestern Order*, 3 FCC Rcd at 458-59, para. 95.

[155] Southwestern December 30 Manual, §6 at 6.

[156] *Id.*, §6 Introduction at 12.

[157] *BellSouth Compliance Order*, 3 FCC Rcd at 6955-56, para. 16.

[158] Southwestern December 30 Manual, §6 Introduction at 12.

[159] We note that Southwestern states that its regulated and customer services cost pools within this account include service order processing costs. *Id.*, §6 at 32-33.

[160] *Id.*, §6 Introduction at 14.

[161] *See U S West Compliance Order*, 4 FCC Rcd at 491, para. 89.

[162] *Southwestern Order*, 3 FCC Rcd at 459, para. 101.

[163] Southwestern December 30 Manual, §6 at 35.

[164] *Southwestern Order*, 3 FCC Rcd at 459, para. 101.

[165] *Id.*, para. 102.

[166] Southwestern December 30 Manual, §6 at 35.

[167] *Id.*

[168] *Cf. U S West Compliance Order,* 4 FCC Rcd at 488, para. 62 (approving application of methodology used for plant investment accounts to corresponding cost pools within Account 2003).

[169] Southwestern December 30 Manual, §6 at 37; Southwestern Initial Manual at 113.

[170] *See Bell Atlantic Compliance Order,* 4 FCC Rcd at 506, para. 95.

[171] *Southwestern Order,* 3 FCC Rcd at 460, para. 107.

[172] Southwestern December 30 Manual, §6 at 37.

[173] 47 C.F.R. §65.450(b)(2); *see Rate Base Order,* 3 FCC Rcd at 281-82, para. 86.

[174] Southwestern Initial Manual at 115.

[175] Southwestern December 30 Manual, §6 at 39.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 10, 1989

US WEST'S NOTIFICATION OF ENHANCED SERVICE MARKET TRIAL (CC DOCKET NO. 88-616)

On March 17, 1989, US West, Inc. (US West) filed in this docket notification of a market trial of an enhanced, voice (audiotex) storage service. According to US West, the voice storage service will allow information providers to store messages and announcements for end users, as well as retrieve messages from end users. US West plans to start the market trial ninety days from the date of its notification. US West also describes its plans for complying with the general conditions for conducting enhanced service market trials established in a recent Common Carrier Bureau order that permits BOCs to conduct market trials of enhanced services for 8-month periods without filing comparably efficient interconnection (CEI) plans. *(See* BOC Notices of Compliance with CEI Waiver Requirements for Market Trials of Enhanced Services, Memorandum Opinion and Order, DA 88-2058, released Jan. 30, 1989)

US West's notification is available for inspection and copying, during normal business hours, in the FCC's Dockets Branch (Room 239), 1919 M Street, N.W., Washington, D.C. 20554. Copies of US West's notification also can be obtained from the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-77

In re

Transfers of Control of Certain
Licensed Non-Stock Entities

Adopted: March 16, 1989; Released: April 11, 1989

By the Commission:

NOTICE OF INQUIRY

1. This *Notice of Inquiry* is being issued to assist us in formulating guidelines for identifying when transfers of control of certain types of licensed non-stock entities are deemed to occur, and in clarifying the procedures to be followed when such transfers are proposed. Although we have established a general framework for addressing these matters in connection with "traditional" stock corporations, we presently lack a comparably articulated Commission policy for determining when a transfer of control of a non-stock entity has occurred. The lack of such a policy has created a degree of uncertainty among our licensees, and on several occasions has unnecessarily exposed various non-stock entities to attack.[1] We believe that the basic principles and approaches used regarding transfers of control of stock corporations can and should be applied to those non-stock entities that (a) are directed by a governing board, and (b) operate pursuant to a written organizational document.[2] It appears that three basic types of non-stock entities possess these characteristics: (1) membership organizations; (2) certain governmental bodies; and (3) organizations with self-perpetuating boards. We have described these entities in greater detail below, and have proposed an analytical framework for handling certain transfer of control issues that may arise when the governing board of any of these entities occupies a locus of control in the licensee.

2. For membership organizations and governmental entities, our proposed approach would track the framework used in the context of stock corporations. Thus, gradual changes in the boards of these two types of non-stock entities -- even if ultimately resulting in the replacement of a majority of the original board members -- would not be considered a transfer of control and would need only be reported as appropriate on the licensee's ownership reports. A sudden change in the majority of the governing board, however, would be considered an insubstantial transfer of control, subject to the "modified short form" consent procedures we established for stock corporations in *Tender Offers and Proxy Contests*. [3] For non-stock entities that have self-perpetuating boards, our proposed treatment would differ, because the governing board of this type of licensee, unlike those in stock corporations and the other two types of non-stock entities, occupies the sole locus of control in the organization. Although the paradigm used in the stock context therefore cannot be applied wholesale to organizations with self-perpetuating boards, the principles underlying the paradigm appear to provide an adequate basis for establishing transfer of control guidelines for such non-stock entities. In this regard, we propose that (a) gradual changes in a self- perpetuating board would not constitute a transfer of control prior to the replacement of a majority of the board's members; (b) if the majority threshold is passed as a result of gradual changes, an insubstantial transfer of control would occur and prior Commission approval would be required by application under the modified short form procedures; and (c) a sudden change in the majority would be considered a substantial transfer of control requiring the licensee to seek Commission approval by submission of a "long form" (FCC Form 315).

3. Before we formalize the above framework as a general statement of Commission policy, however, we are initiating this *Notice of Inquiry* to invite comments from interested parties on various aspects of the framework. On the most basic level, we seek comment on whether our assumptions about the structure and operation of the three types of non-stock entities are correct. To the extent we have proposed to treat these entities in an analagous fashion to stock corporations because of similarities in structure and operation, we request comment on whether the non-stock entities possess any characteristics that differ sufficiently from those of stock corporations to justify a modification of the proposed framework. To the extent we have proposed, for non-stock entities, departures from (or additions to) the framework used in the stock context, we invite general comment. Finally, we invite interested parties to comment on whether the proposed framework for non-stock entities can be extended beyond our specific proposals to cover certain situations where the analogy between stock corporations and non-stock entities appears less clear-cut.

BACKGROUND

4. Section 310(d) of the Communications Act of 1934, as amended, prohibits the "transfer of control of any corporation" that holds a construction permit or station license, "except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."[4] The Act, however, does not contain any definition of the term "control" or the phrase "transfer of control," nor does it contain any formula by which "control" may be determined.[5] As the United States Court of Appeals for the District of Columbia Circuit observed, "[d]etermining issues of control . . . is a complex task which must be done on a case-by-case basis."[6]

5. With respect to traditional commercial corporations, we have developed general guidelines for determining where control resides and what constitutes a transfer to aid in discharging our duties under Section 310(d).[7] We adopted this approach for these corporate entities because issues of control cannot be resolved by referring to strict definitions or set formulae. Particularly when dealing with cases involving *de facto* control, there can be no hard and fast rules because corporate control varies from company to company, and each case may present unique complexities. Under the *general* guidelines that do exist, we attach "prime importance" to majority stock ownership, because the individual or group who owns a majority of the stock has legal control of the corporation, and hence the right to exercise or delegate actual control.[8] A

change in ownership of a majority of the corporation's stock, by itself, constitutes a transfer of legal control of a traditional corporation, requiring prior Commission consent.[9] Of course, in some cases no one person or entity holds a majority of the stock, or for various reasons, *de facto* control is held and exercised by non-majority stockholders or by others. Because of such possibilities, the Commission does not confine itself to an analysis of changes in legal control, but also will look beyond stock ownership to determine whether actual working control of a traditional corporation has been transferred.[10] In determining the locus of actual control, we look primarily to the "power to dominate the management" of the licensee's affairs.[11] As we have stated, "[g]enerally, the principal indicia of control examined to determine whether an unauthorized transfer of control has occurred are control of policies regarding: (a) the finances of the station; (b) personnel matters; and (c) programming." *Mutual Radio of Chicago, Inc.*, 98 FCC 2d 330, 338 (1984).[12]

6. We have recognized that in a traditional stock corporation, the board of directors may well constitute a cognizable locus of control, and changes in such a board's membership (even if unaccompanied by any transfer of stock or on-going voting interests) may comprise an insubstantial transfer of control requiring advance Commission consent.[13] Not all changes in such a "controlling" board, however, would trigger the prior approval requirements of Section 310(d). For instance, a change in less than a majority of the board would usually not rise to the level of a transfer of control.[14] We have also taken the approach that prior Commission approval is generally not required when a corporate election only results in a change in a minority of the board, even if, over time, a majority of the board is eventually replaced.[15] Conversely, an abrupt change (or change within a short period of time) in a majority of a controlling board of directors would likely constitute an insubstantial transfer of control.[16]

7. In addition to the above guidelines, we also have established several different procedures for handling transfers of control, depending on the nature of the transfer. All transfers of control are, of course, subject to the requirements of Section 309 of the Communications Act, which sets forth the procedures required for the Commission's Section 310 determination of whether the public interest, convenience and necessity will be served by a transfer of control.[17] Although every transfer of control must have prior Commission consent, the full panoply of Section 309 procedures is not mandatory for any transfer of control "which does not involve a substantial change in ownership or control." 47 U.S.C. §309(c)(2)(B).

8. Generally speaking, substantial changes require the filing of transfer of control applications on FCC Form 315 (the "long form" application which initiates the full range of procedures set forth in Section 309 and implemented by our Rules).[18] If the transfer is insubstantial, however, we only require the filing of the more abbreviated FCC Form 316 (the "short form").[19] We also have established a "modified short form" application procedure for insubstantial transfers of control arising from changes in the composition of a stock corporation's board of directors.[20] Under the modified short form procedure, an applicant must supplement Form 316 with information on (a) citizenship, (b) attributable interests in cable television systems, newspapers or other broadcast stations, and (c) adverse findings or adverse final action by a court or administrative body concerning any felony, broadcast-related antitrust or unfair competition, criminal fraud or fraud before a governmental unit, or discrimination.[21]

9. Although we have developed the above-described substantive and procedural guidelines concerning transfers of control of traditional *stock* corporations, we have never established a comparable framework for *non - stock* corporations or other organizational structures that are not "owned" in the traditional sense.[22] We do not now, in fact, propose to formulate conclusive or all-inclusive guidelines as to the locus of control of non-stock entities or the circumstances that will constitute a transfer of control. Even with stock corporations, we have not created such rigid guidelines for assessing *de facto* control, because each case will turn to a large degree on its own unique factual circumstances. Accordingly, we do not propose inflexible guidelines for non-stock entities. Moreover, since non-stock entities exist in a wide variety of organizational structures, we must tailor even general guidelines to specific types of non-stock entities. We believe that the vast majority of licensed non-stock entities possesses two key characteristics shared by stock corporations, and that the existing general guidelines for stock corporations can therefore be adapted to those non-stock entities that have these characteristics. We now turn to a discussion of these characteristics, the three types of non-stock entities that we believe possess these characteristics, and the adapted guidelines we propose to apply to the three. At the outset, however, we stress that we are not reopening the debate over the principles underlying our approach toward transfer of control issues that arise with stock corporations, and we will not allow this proceeding to become a "back door" vehicle for revisiting issues that have already been decided in our *Tender Offers and Proxy Contests* proceeding.[23]

DISCUSSION

10. The first common characteristic of the licensed non-stock entities addressed in this *Notice* is that each will have a "governing board" that directs the operations of the licensee.[24] The second characteristic is that this type of licensee will operate pursuant to and in accordance with a written organizational or enabling document (such as a charter, statute or law), which in general will specify the purpose and structure of the entity and the rights and duties of the governing board (and other participants, if any).[25]

11. We have identified three basic types of non-stock entities that possess these characteristics.[26] The first type is the "membership" organization, in which a body of members elects a board of directors, which in turn exercises policy making authority in accordance with the entity's written organizational document. For example, the "membership" may consist of contributors to the station (*e.g.*, the "members" of a noncommercial educational station who are entitled to vote for the station's board of directors by virtue of their contributions). Other examples of an organization's "membership" might include the individuals who belong to an association or union, or the congregation of a church. The second type of non-stock entity is the governmental agency, such as a municipality, school board or state authority. The governing board of this kind of entity is generally appointed by elected officials, either directly or indirectly, and the written organizational document (*e.g.*, a statute) can usually be

changed only by the action of a superior governmental agency (*e.g.*, the legislature). The third type of licensee that possesses the two relevant characteristics is the organization with a self-perpetuating board, such as a foundation or a private educational institution. With this type of entity, the ultimate policy making authority rests in a governing board that selects its own replacements (or "perpetuates" itself in office). In addition, the governing board has the power to select the individuals who perform the day-to-day operational functions of the station. Unlike the other two types of non-stock entities (and unlike the stock corporation) -- where ultimate authority theoretically resides outside the governing board -- the ultimate authority of the organization with a self-perpetuating board is the board itself.[27] While this governing board is required to operate the organization in accordance with its written organizational document, it may, however, have the power to amend that document.

12. As with stock corporations, the actual control of these three non-stock entities may reside, for Section 310(d) purposes, in their governing boards.[28] In such cases, we believe that the guidelines used for stock corporations can be applied to non-stock entities in the manner described below.

13. *Membership Organizations*. With regard to membership organizations, we propose, in most respects, to treat such licensees in the same manner as stock corporations. Although in one situation voting power is acquired through the purchase of stock, and in the other, voting is acquired through membership or in other ways, both types of organization appear to be largely equivalent in terms of overall structure and function as they relate to control. Each has a body of voters holding ultimate control over the organization, insofar as such voting body elects a smaller governing body which is responsible for establishing and articulating organizational policy between elections.[29] While the parallels between a stock corporation and a membership organization thus appear to be close enough to justify the same treatment in the transfer of control context, we realize that our description of membership organizations is drawn in general terms. To test the analogy we have made, we seek specific examples of the structure and operation of membership organizations. For example, we invite comments on whether the governing board of a membership organization is comparable to a corporate board of directors in terms of function and power. Are there any other loci of control (other than the voting members themselves)? If so, how do these loci coordinate, and is there any clear demarcation of authority? On the member level, we seek comments on the degree of power the members hold. Are members generally limited to single votes on the composition of the board, or do they have additional or ancillary rights and powers? Our core concern or interest in raising these questions is to determine whether our assumptions about membership organizations are correct, and whether there are any reasons based on the structure and operation of these organizations to treat them differently than stock corporations in determining when a transfer of control has occurred.

14. If our underlying premises about membership organizations are sound,[30] we propose the following guidelines. At the outset, we believe that gradual changes in the governing boards of membership organization licensees should be treated the same as gradual changes in the boards of directors of traditional commercial corporate licensees -- *i.e* ., not as a transfer of control. As with a stock corporation, gradual changes in the governing board of a membership organization may occur as a result of the replacement of one or more directors (but less than a majority) at the expiration of their normal terms of office. Where less than a majority of a governing board is replaced at one time, continuity of control is provided by the majority of the governing board which remains unchanged. As we stated in *Tender Offers and Proxy Contests*, "the fact that the changes in the Board occur over a period of time is an important factor militating against a finding of a transfer of control."[31] Accordingly, we believe that a change in less than a majority of the governing board of a membership organization, made in accordance with general procedure or operation of the entity, should not be considered a transfer of control requiring prior Commission consent. Such changes in a governing board would only need to be reported in the licensee's ownership reports.

15. A different situation would exist if a majority of the governing board of a membership organization changed at one time or within a short period of time, because in such a situation, continuity of control would be effectively broken. We believe that in view of the posited authority and responsibility exercised by the governing board of a membership organization, a change in a majority of the board which occurs at one time or within a short period of time should be considered a transfer of control. We seek comments, however, on whether we should define the phrase "short period of time," and if so, what the appropriate definition should be. It is our preliminary belief that, in the interests of rendering a licensee's obligations as definite as possible, a specific period of time should be adopted.[32] Moreover, this period should be short enough so that "evolutionary" changes in the board are not classified as transfers of control.[33] It appears to us that a change in the majority of a governing board, which occurred over a period of less than one year, would effectively break continuity in the board and should therefore be treated as having taken place within a "short period of time." Factors that commenters should address in assessing whether this proposed time frame is appropriate should include the usual length of time between elections, the typical term of office of a member of a governing board, and the frequency of specially-called elections.

16. Although we propose to treat a sudden change in a majority of a membership organization's governing board as a transfer of control, we do not intend to classify it as a "substantial" transfer requiring "long form" treatment, but only as an "insubstantial" transfer.[34] *See supra* at ¶ 8. Most importantly, the powers of a membership organization's governing board are somewhat limited and derivative. The governing board is accountable ultimately to the entity's general members, who hold the power to vote any board member out of office, and a change in the composition of the board does not alter the nature of this power. Furthermore, as with a stock corporation, such a change does not affect the continuing nature of the entity itself. The entity's representations to the Commission and all of its contracts are unaffected. The potential range of the entity's function and structure remain the same, so long as the written organizational document is not changed. Similarly, the governing board is still required to operate the entity in accordance with the written organizational document. Accordingly, we propose that a transfer of

control resulting from a sudden change in a majority of the governing board of a membership organization be considered an insubstantial transfer of control. As with stock corporations, prior Commission consent to the insubstantial transfer would be required in accordance with the "modified short form" application procedure specified in *Tender Offers and Proxy Contests*.[35]

17. To identify a *substantial* transfer of control of a membership organization, one option might be to continue drawing on the analogy between membership organizations and stock corporations. Just as we usually treat a change in 50 percent or more of a corporation's stock as a substantial transfer of control, we could also classify a change in membership share of 50 percent or more as a substantial transfer.[36] For a number of reasons, however, we question whether this approach is workable, or even whether the analogy is valid. If, as we suspect, individual members of a typical membership organization possess only a single vote per member, without the ability to obtain authority over more than that one vote, then unless the number of members is exceedingly small, it would be impossible to effect a substantial transfer of control analogous to that which occurs when a single stockholder obtains majority control of a corporation. Moreover, a turnover in membership, even involving a majority of members, may not constitute a cognizable transfer of control.[37] Indeed, even in the stock context we do not aggregate the results of disparate transactions (by different owners) in evaluating whether a transfer of control of a publicly held corporation has occurred.[38] In addition to the conceptual difficulties of generally classifying majority changes in a membership organization's pool of members as a substantial transfer of control, there appear to be significant practical difficulties. For example, the requirement that Commission consent be obtained before a transfer of control occurs may be impossible to fulfill in any sensible manner if the membership pool changes gradually as a result of the natural development of the organization. On the other hand, general guidelines may be workable and worthwhile if limited to situations where the membership changes in cohesive groups.

18. At this point, we need additional information on how membership organizations tend to operate to decide whether we should establish -- or even can establish -- general guidelines for identifying substantial transfers of control that may occur when the overall composition of the general members changes. Accordingly, we seek comments on the way voting mechanisms in membership organizations operate, the degree of power held by members, and the frequency of cohesive action by groups of members (or whether cohesive action in fact takes place). More generally, we invite comments on whether substantial transfers of control ever occur in membership organizations as a result of majority changes in the composition of its pool of general members, and if so, whether general guidelines would be possible or of any use (either in the forms discussed above or in other forms). If the conclusion is that substantial transfers rarely (or never) result from such changes in the general member pool, then we request comment on what would constitute a substantial transfer of control, and what general guidelines for identifying them can be fashioned, if any.[39] Although we could hypothesize various other changes in a membership organization, which, together with an abrupt change in the majority of the governing board would constitute a substantial transfer of control, such scenarios would be so fact-specific or so conclusory that the purpose of this *Notice* -- to establish guidelines of general applicability -- would be defeated. It may well be that the best approach would be to continue to treat substantial transfers of control of membership organizations on a case-by-case basis. We request comment on this issue.

19. *Governmental Agencies*. We propose to treat governmental licensees in a similar fashion to membership organizations, in connection with many of the transfer of control issues under discussion here. Like a membership organization, this type of licensee usually has a governing board that may occupy the locus of control in the entity and that derives its authority and power from, and is limited in its actions by, the organizational "document" that creates the licensed entity. In addition, ultimate control of both licensees theoretically rests with a group outside the board: in the case of the membership organization, with the general members, and in the case of a governmental licensee, with the electorate of the relevant geographic subdivision.

20. Consistent with our proposed treatment of membership organizations, we propose that gradual changes in the governing boards of a governmental licensee not be classified as a transfer of control; the licensee must report such changes in its ownership reports, but prior Commission consent would not be required. As with membership organizations, a sudden change in a majority of the governing board would be treated as an insubstantial transfer of control requiring prior Commission approval through the modified short form application procedure. For these proposals, we invite comments on the same range of questions that we raised for membership organizations. On the subject of substantial transfers of control, our major questions (and the range of comments we invite) are also similar. The basic inquiry is whether it is possible to fashion general guidelines for identifying substantial transfers of control, and, if so, what they should be.[40]

21. In addition, we seek comment on whether there are any special considerations that should be accorded governmental entities, either for practical reasons or for reasons of federal policy. While we do not believe there is any compelling reason for different treatment -- our rules, as well as the Communications Act, draw no distinction in the transfer of control context -- we are willing to entertain comments on this point. We also ask for comments on whether we need to define more precisely what would constitute a governmental licensee. Clearly, for example, a school board holding an FCC license would fall into the governmental licensee category. Finally, we seek comment on whether there are any "gray" areas where a definitional ambiguity would create difficulties in applying the framework we have proposed.

22. *Entities with Self - Perpetuating Boards*. We propose to treat organizations that have self-perpetuating boards differently than both the other types of non-stock entities and stock corporations. The key distinguishing attribute of an organization with a self-perpetuating board is that the governing board is the sole locus of control; such a board lacks even the limitation of an underlying voting body on its control that theoretically exists over the boards of membership organizations and governmental entities. The composition of a self-perpetuating board cannot be altered by the organization's members, by any electorate or by anyone in an analagous position to the stockholder in a traditional corporation. Since the self- perpetuating board occupies the sole locus of control, lacking the restraint of

an alternative, superior control group, the closest analogy we can draw from the traditional corporate context, for transfer of control purposes, is the stockholders (rather than the corporate board of directors). Both the self-perpetuating board and the stockholders possess ultimate authority over their respective organizations. Because of such authority, when, in the traditional corporate context, a new majority stockholder (or stockholder group) comes into existence, that stockholder gains the power to change the corporation's policies, direct its actions and alter the very nature of the organization. In this sense, the organization is a potentially different one than that which we have licensed, and the Communications Act requires the Commission's prior approval before the consummation of the transactions that will result in the new majority stockholder.[41] Similarly, a majority change in the composition of a self-perpetuating board creates a new group with ultimate control over the licensee, a group whose qualifications we have never assessed. For these reasons, we propose to treat a majority change in the composition of a self-perpetuating board, whether it occurs gradually over time or abruptly, as a transfer of control requiring prior Commission consent.[42] We seek comments on whether we have correctly characterized the degree of power held by self-perpetuating boards, and whether they possess (or lack) any attributes that would militate against or require alterations in our proposal to treat all majority changes as transfers of control. Similarly, we invite comment on whether our description of the manner in which organizations with self-perpetuating boards operate is sufficiently accurate to support this proposal.

23. In the event we determine that majority changes in self-perpetuating boards will generally signal a transfer of control of the licensee, we must next decide whether to adopt guidelines for classifying such transfers as "substantial" or "insubstantial." For the reasons set forth below, we believe that gradual changes in a self-perpetuating board should be treated as an insubstantial transfer of control once a majority of the original board has been replaced, while an abrupt replacement of a majority would be treated as a substantial change.[43]

24. Gradual changes in the composition of a self-perpetuating board would likely represent an evolutionary change in the licensee, and even at the point when a majority threshold has been passed, we do not believe that the continuity of control of the licensee will be materially disrupted. In this regard, gradual changes in a self-perpetuating board are akin to gradual changes in a stock corporation's board of directors, which we do not treat as cognizable for transfer of control purposes, even if the changes eventually result in a replacement of the majority of the board.[44]

25. As indicated above, however, the absence of an alternative, superior locus of control in an organization with a self-perpetuating board justifies a different treatment for such organizations. The reason for this is that, unlike with a stock corporation, where the election of the new directors (if unaccompanied by any changes in stock ownership or voting rights) never involves a change in ultimate legal control, in the case of an organization controlled by a self-perpetuating board, ultimate control would change once a majority of the original governing board has been replaced. In this respect, the gradual replacement of a majority of a self-perpetuating board is analagous to a gradual change in a majority of stock ownership in a closely held corporation; in both situations, the sole existing control group in the organization consists of relatively few individuals, and a majority change would therefore alter the character of the entity to a much greater extent than is the case when a majority of stockholders in a large publicly held corporation changes. We therefore view it as our obligation under Section 310(d) to review the qualifications of a proposed new majority.

26. Nonetheless, we do not believe that a gradual change in the majority of the self-perpetuating board is equivalent to a typical *substantial* transfer of control case in the corporate context, where a new majority stockholder, upon whose qualifications we have not had the opportunity to pass, assumes legal control of the licensee. That stockholder is a unified force in the corporation, and the ultimate control over the licensee has, by definition, passed abruptly to a new, cohesive source. In contrast, a gradually developed new majority of a self-perpetuating board is composed of various individuals, who, in some cases, have been serving on the board for some time, and such majority therefore does not constitute the type of unified force, or entail the type of change, that is introduced when a new majority stockholder takes control of a corporation. Because of such differences, we propose to treat a majority change in a self-perpetuating board, which arises from a gradual transition of board members, as an insubstantial transfer of control.[45] We recognize, however, that the new majority -- even if it has evolved gradually -- consists of individuals upon whose qualifications we have not passed, and that this majority does have the potential to act cohesively. Accordingly, we propose that the licensee be required to seek Commission approval for the insubstantial transfer under the modified short form application procedure.[46] Since the paradigm furnished by our treatment of stock corporations does not fit as neatly with organizations that have self-perpetuating boards as it does with the other two types of non-stock entities, we invite general comment on the approaches we have proposed in this paragraph.

27. In contrast to gradual changes, we propose to treat an abrupt change in the majority composition of a self-perpetuating board as a substantial transfer of control. With an abrupt change, the continuity of the board (which is the sole locus of control in the licensee) is clearly broken. This situation is more closely analagous to a substantial transfer of control in the stock context, where a new majority stockholder emerges instantly as a new, cohesive controlling force, than is a situation where a new majority in the board arises as a result of gradual changes. In the context of gradual changes, when the election of the "last" board member marks a majority change over the original composition of the board, the "new" board does not differ by a majority over the one immediately preceding it (as opposed to the board as *originally* constituted). Since the licensee has presumably operated acceptably for some time under a board not markedly different than the "new" one, the change does not appear to justify subjecting the licensee to long form review and the full panoply of Section 309 procedures. In contrast, no similar track record exists for the licensee whose self-perpetuating board undergoes an abrupt change in majority composition. In essence, the new board is a significantly different entity than the immediately preceding one, and, because a self-perpetuating

board acts as the immediate *and* ultimate source of control of the licensee, such an abrupt change effectively transforms the licensee into an entity that we have never evaluated. We therefore propose to treat a sudden majority change in a self-perpetuating board as a substantial transfer of control, requiring prior Commission approval under the "long form" application procedures. We invite general comments on this variation of the paradigm we apply to changes in traditional corporate boards of directors.

28. In the preceding paragraphs, we propose to evaluate transfers of control depending on the type of non-stock entity involved. A different approach would be to treat these kinds of non-stock entities the same for purposes of determining when a transfer of control takes place. We request comment on whether this more simplified approach would provide adequate guidelines for different types of non-stock licensees, or whether it is necessary to differentiate among the types of entities as we propose above. If commenters consider that the same criteria can be applied to all three types of non-stock entities, we request that they address which of the standards described above should be applied to determine whether a transfer of control has occurred. We also invite comment on which such transfers should be considered substantial, requiring Commission approval under the "long form" approval procedures, and which could be treated as insubstantial, requiring approval under the "modified short form" procedures.

SUMMARY AND CONCLUSIONS

29. Our above-described proposals are designed to establish a framework for dealing with transfers of control of licensed non-stock entities that (a) are directed by a governing board, and (b) operate pursuant to a written organizational document.[47] We believe that most licensed non-stock entities possess these characteristics, and we have categorized such entities into three groups: membership organizations, governmental entities and organizations with self-perpetuating boards. If actual working control over an entity in one of these three groups is held by the entity's governing board, we propose the following guidelines and request comment to the extent indicated in this *Notice:*

(a) Gradual changes in the governing boards of membership organizations and governmental entities -- even if the changes ultimately result in the replacement of a majority of the original board members -- would not be considered transfers of control within the meaning of the Communications Act, and would need only be reported as appropriate on the licensee's ownership reports.

(b) While gradual changes in a self-perpetuating board of a licensed non-stock entity would also fail to rise to the level of a transfer of control prior to a replacement of a majority of the board's members, once the majority threshold is passed, an insubstantial transfer of control would occur and prior Commission approval must be sought on an FCC Form 316 (short form) application, supplemented by information on all the new board members and nominees regarding citizenship, adverse findings of law violations, and other attributable media interests.[48]

(c) A sudden change in a majority of the governing board of a membership organization or governmental entity would be considered an insubstantial transfer of control, subject to the modified short form consent procedures described immediately above.

(d) A sudden change in a majority of a self-perpetrating board of a licensed non-stock entity would be considered a substantial transfer of control requiring the licensee to seek Commission consent in accordance with the full panoply of Section 309 requirements, under the Commission's FCC Form 315 (long form) transfer procedures.

(e) In the alternative, the three types of non-stock entities addressed -- membership organizations, governmental entities, and entities with self-perpetuating boards -- might be treated the same in evaluating transfers of control if this approach would provide adequate guidelines for each.

30. As discussed in paragraphs 17, 18 and 20 above, we view it as an open question whether general guidelines can be established for identifying substantial transfers of control of membership organizations and governmental entities, or whether we should continue to deal with this issue on a case-by-case basis. It appears to us that neither the framework used in the stock context, nor the principles drawn from that framework, provide a ready structure for generalizing how substantial transfers of control of these two types of non-stock entities are to be identified. Accordingly, we have not proposed any particular guidelines in this area, but instead seek a somewhat broader range of comments than we have requested for the other aspects of the proposed framework.

31. In conclusion, we remind commenters that whatever guidelines are ultimately adopted, they will simply comprise a framework for providing greater certainty in assessing transfers of control of non-stock entities. A departure from the framework thus may be warranted depending on the particular facts of the case. For example, a non-stock licensee may be structured in a way that departs from the assumptions of the framework, or control may not in fact rest with the entity's governing board. We do not view these possiblities as a source of concern, however, because we intend the proposed framework to operate as flexibly as does the existing framework for stock corporations.

ADMINISTRATIVE MATTERS

32. This *Notice of Inquiry* is issued pursuant to authority contained in Sections 4(i), 303, 308(b), 309(g), 319 and 403 of the Communications Act, as amended. Under the applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **June 1, 1989,** and reply comments on or before **June 16, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary,

Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

33. For further information concerning this proceeding, contact David E. Horowitz, Policy and Rules Division, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See, e.g., Seven Locks Broadcasting Co.*, 94 FCC 2d 899, 901-02 (1983) (When competing applicant unsuccessfully sought to add transfer of control issue against renewal applicant -- a non-stock entity -- Commission observed that it has never clearly set forth circumstances that would constitute transfer of control of non-stock entity, and that necessity for filing transfer application in instant case was unclear.).

[2] These two characteristics are described more fully below.

[3] 59 RR 2d 1536 (1986), *petition dismissed as unripe sub nom. Office of Communication of the United Church of Christ*, 826 F.2d 101 (D.C. Cir. 1987).

[4] 47 U.S.C. §310(d). Subsection (d) also prohibits the assignment of a permit or license without prior Commission approval. The basic difference between an "assignment" and a "transfer of control" is that in the former case the license (or permit) passes to an entirely new entity. In a transfer of control situation, on the other hand, the identity of the licensee does not change. Rather, control of the licensee passes to different principals, typically by a transfer of ownership interest.

[5] *Tender Offers and Proxy Contests*, 59 RR 2d at 1542; *Committee for Full Value of Storer Communications, Inc.*, 101 FCC 2d 434, 441, *aff'd sub nom. Storer Communications, Inc. v. FCC*, 763 F.2d 436 (D.C. Cir. 1985); *News International, PLC*, 97 FCC 2d 349, 355 (1984); *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981); *Stereo Broadcasters, Inc.*, 55 FCC 2d 819, 821 (1975); *Benjamin L. Dubb (Western Gateway Broadcasting Corp.)*, 16 FCC 274, 288 (1951).

[6] *Storer Communications, Inc. v. FCC*, 763 F.2d at 442.

[7] *See generally Tender Offers and Proxy Contests*, 59 RR 2d 1536, and cases cited therein. The "traditional" corporation is characterized by stock ownership, whereby the holder possesses certain specified voting or profit-sharing rights.

[8] *Albert J. Feyl*, 15 FCC 823, 826 (1951); *Peoria Community Broadcasters, Inc.*, 79 FCC 2d 311, 317 (1980); *Stereo Broadcasters, Inc.*, 55 FCC 2d at 821-22; *Tender Offers and Proxy Contests*, 59 RR 2d at 1542 n.29.

[9] *Albert J. Feyl*, 15 FCC at 826; *Peoria Community Broadcasters, Inc.*, 79 FCC 2d at 317; *Stereo Broadcasters, Inc.*, 55 FCC 2d at 821-22.

[10] *Albert J. Feyl*, 15 FCC at 826; *Tender Offers and Proxy Contests*, 59 RR 2d at 1542; *Mutual Radio of Chicago, Inc.*, 98 FCC 2d 330, 338 (1984); *George E. Cameron Jr. Communications*, 91 FCC 2d 870, 887 (Rev. Bd. 1982); *Paramount Television Productions, Inc., et al.*, 17 FCC 264, 340 (1953).

[11] *Benjamin L. Dubb*, 16 FCC at 289. *See also News International, PLC*, 97 FCC 2d at 355-56; *WHDH, Inc., et al.*, 17 FCC 2d 856, 863 (1969), *aff'd sub nom. Greater Boston Television Corporation v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 US 903 (1971).

[12] *See also Southwest Texas Public Broadcasting Council*, 85 FCC 2d at 715. Day-to-day actions and decisions in these areas may be delegated to managerial personnel. *Id.* at 715-16.

[13] *See, e.g., Committee for Full Value of Storer Communications, Inc.*, 101 FCC 2d at 443.

[14] *See Tender Offers and Proxy Contests*, 59 RR 2d at 1544-45. A change of any director, regardless of its effect on control, must nevertheless be reported in the licensee's annual ownership report (for commercial stations) or in an ownership report filed within 30 days of the change (for noncommercial educational stations). *See* 47 C.F.R. §73.3615.

[15] *Tender Offers and Proxy Contests*, 59 RR 2d at 1545 n.40. It is important to keep in mind that these general rules may not apply to a given case. We have stressed that the question of whether a change in a board will constitute a transfer of control remains a highly fact-specific inquiry. *See id.* at 1543-45. The general rules recounted here are part of a framework for analyzing individual cases and for providing licensees with guidance on fulfilling their obligations under Section 310(d) and its associated rules.

[16] *Cf. Committee for Full Value of Storer Communications, Inc.*, 101 FCC 2d at 443.

[17] 47 U.S.C. §309. In brief, the full panoply of procedures required by Section 309 consists of public notice of the transfer of control application, a thirty-day minimum waiting period, an opportunity for opposition and reply, and a hearing on any substantial and material question of fact. *Id.*

[18] For transfers of control that arise from the sale of stock, the general tests for whether the interest to be transferred is substantial have been "(a) whether 50% or more of the stock is being transferred . . . and (b) whether as a result of the transaction 50% or more of the outstanding stock will be held by a person or persons whose qualifications have not [previously] been approved of or 'passed upon.'" *Barnes Enterprises, Inc.*, 55 FCC 2d 721, 725 (1975). We would stress, however, that even these guidelines may be inapplicable under the circumstances of a particular case.

[19] Section 73.3540(f) of our Rules lists six types of transfers that may be considered insubstantial (and, hence, for which the Commission's approval may be sought by short form application). 47 C.F.R. §73.3540(f). We are not, however, limited to these six categories in considering whether or not a particular transfer can be deemed "insubstantial" under Section 309(c)(2)(B) of the Act. *See Tender Offers and Proxy Contests*, 59 RR 2d at 1449 n.63.

[20] *See Tender Offers and Proxy Contests*, 59 RR 2d at 1551-52.

[21] *See id.* at 1551-52, and 1551 n.73. We note that the specific types of reportable violations enumerated in (c) above differ somewhat from those set forth in our *Tender Offers and Proxy Contests* decision. These differences stem from the revisions we made in our policies regarding character qualifications of broadcast applicants. *See Character Qualifications*, 102 FCC 2d 1179, *reconsid. denied*, 1 FCC Rcd 421 (1986).

[22] *Seven Locks Broadcasting Co.*, 94 FCC 2d at 901. *See also Pacifica Foundation* (II), 41 FCC 2d 71, 72 (Rev. Bd. 1973); *Pacifica Foundation (I)*, 36 FCC 147 (1964). In *Pacifica Foundation I*, we held that a particular organizational change in Pacifica's by-laws constituted a transfer of *legal* control of the foundation, and we then granted an application seeking consent to that transfer. We did not, however, establish general guide-

lines or indicate how we would approach a change in actual working control (without an accompanying change in legal control) of such a licensed entity.

[23] MM Docket No. 85-218, decided at 59 RR 2d 1536.

[24] *See, e.g., Seven Locks Broadcasting Co.*, 94 FCC 2d at 901; *Pacifica Foundation II*, 41 FCC 2d at 72; *Pacifica Foundation I*, 36 FCC at 151-52.

[25] For those non-stock entities which do not have these characteristics, the proposed guidelines for resolving transfer of control issues may not apply, so we will continue to address such transfers exclusively on a case-by-case basis.

[26] We invite comments on whether there is any category of non-stock entity not addressed here, which possesses the two key characteristics described above and which therefore could also be treated similarly to stock corporations.

[27] An organization would still be classified as having a self-perpetuating board even if the organization accepted general members, provided those members held no voting rights that would affect the board's power.

[28] The approach for determining if actual control resides in a board would be the same for non-stock entities as it is for stock corporations. With both types of licensees, the principal indicium of control is control over policies concerning the station's finances, personnel matters and programming. *See supra* ¶ 5. Although we place, at the outset, "prime importance" on majority stock ownership when assessing control of a stock corporation, this may not be appropriate with respect to non-stock entities, because there may be no analogue to a majority stockholder. Indeed, for organizations with self-perpetuating boards, there will never be a governing body other than the board itself with power and authority equivalent to a majority stockholder.

[29] If anything, the governing board of a membership organization *may* be more autonomous than a corporate board of directors, because individual members may be limited to a single vote, and the entity may have no proxy mechanism. Accordingly, it may be inherently more difficult to marshal power on the member level than it is on the stockholder level. If the members within a membership organization do not generally hold power comparable to that of corporate stockholders, the logical question is whether the members' power is sufficient to conclude that they occupy a locus of control superior to that of the governing board. If the members do not hold such power, we question whether we should adopt our proposal to treat changes in a governing board of a membership organization the same as changes in a traditional corporate board of directors. We invite comment on these queries.

[30] Commenters should bear in mind that our goal is to establish a working framework for dealing with various transfer of control issues concerning non-stock entities. Clearly, some membership organizations will differ in particulars from our general characterization, but minor or atypical differences should not affect the validity of the analogy we have drawn between membership organizations and stock corporations.

[31] *Tender Offers and Proxy Contests*, 59 RR 2d at 1545 n.40.

[32] We note that in our treatment of stock corporations, we have not established sharp cut-off points for distinguishing between gradual and abrupt majority changes in boards of directors. We do not intend to address this matter in the context of stock corporations, given the scope of this proceeding -- *i.e.*, to determine how best to adapt to non-stock entities the existing framework and principles for handling transfers of control of stock corporations.

[33] As the Court of Appeals stated in *Storer Communications, Inc. v. FCC*, 763 F.2d at 442, "[d]irectors may also change on an evolutionary basis, *e.g.*, several directors may retire or resign over the course of a year[,]" and "[t]he Commission only requires that such evolutionary changes be reported on an annual Ownership Report."

[34] This is the basic approach we took in resolving the transfer of control dispute raised in *Committee for Full Value of Storer, Inc*, 101 FCC 2d 434. *In Tender Offers* and Proxy Contests, 59 RR 2d at 1546-49, we established more broadly that transfers of control arising from changes in a stock corporation's board of directors would generally constitute "insubstantial" transfers.

[35] *See id.* at 1551; see also supra ¶ 8.

[36] We reiterate that despite our articulation of general guidelines, our approach to transfers of control in stock corporations -- as well as our proposed approach to non-stock entities -- do not consist of hard and fast rules but only create presumptions which may be rebutted in certain factual contexts. Thus, under the appropriate circumstances, a change in a majority of a corporation's stock may not in fact constitute a substantial transfer of control. *See supra* note 18.

[37] Cf. *Craw-Kan Telephone Cooperative Association*, 46 RR 2d 124, 126-27 (Comm. Carr. Bur. 1979). In this case, the Chief of the Common Carrier Bureau, by delegated authority, held that a transfer of control had not occurred despite the fact that the membership of the licensee (a nonprofit telephone cooperative association operating in the Domestic Public Land Mobile Radio Services) had grown by more than 50 percent. Although the members were the technical owners of the cooperative and were responsible for electing directors to the Board of Directors (which managed the cooperative), the Common Carrier Bureau held that the "amount of 'control' which an individual member may exercise is not transferred or otherwise affected by fluctuations in membership." *Id.* at 126. While this statement may go too far -- clearly a vast increase in the size of a very small membership group could materially dilute the power of a given member's vote -- the point is well taken.

[38] For example, the majority of stock in a large, publicly-traded corporate licensee may rest in numerous small shareholders who, over time, sell their shares to other small investors. We do not aggregate each of these disparate transactions and require the licensee to file a transfer of control application when the original pool of small investors eventually changes. On the other hand, we do assess the cumulative effect of disparate stock transfers in cases involving closely held corporations. *Cf. Elyria-Lorain Broadcasting Co.*, 3 RR 2d 717, 720 (1964) (indicating that at point when 50 percent of stock of licensee was held by individuals or entities other than original 62 stockholders, transfer of control had occurred). It appears to us, however, that the individual members of a typical membership organization are closer in nature to the stockholders in a publicly held corporation than to the stockholders in a closely held corporation, because members usually constitute a large, relatively uncoordinated group of individuals.

[39] As we indicated in paragraph 16 above, at this point we do not believe that a transfer of control resulting from an abrupt change in a majority of the membership organization's governing board would constitute a *substantial* transfer of control, because the parallels on this level to stock corporations appear compelling.

[40] We note that one guideline related to transfers of control is clear: an *assignment of license* from one governmental entity to another would require prior Commission approval in accor-

dance with the full panoply of procedures specified in Section 309 of the Communications Act and in the Commission's Rules. *See* 47 U.S.C. §§309, 310(d); 47 C.F.R. §73.3540.

[41] *See* 47 U.S.C. §310(d).

[42] Changes in less than a majority of a self-perpetuating board would be treated as we have proposed for boards of membership organizations and governmental entities -- *i.e.*, not as a transfer of control.

[43] In cases where changes in the board consist of an addition of board members, we would regard the triggering event as the point when the number of new members equals the old, because it is only then that the new members can exert negative majority control over the licensee. We request comment on whether the *deletion* of board members would ever trigger a transfer of control.

[44] *See supra* ¶ 14.

[45] On the other hand, we have analogized such a gradual board change to a gradual change in the majority of stock of a closely held corporation, and we treat the latter case as a substantial transfer of control. Because key differences do, however, exist between members of a self-perpetuating board and stockholders (*e.g.*, a board member has certain fiduciary duties that a stockholder does not), we do not think that gradual changes in a majority of a self-perpetuating board should be treated as a substantial transfer of control. We request comment on this point.

[46] The information that we would require in addition to that which is requested on Form 316 (*i.e.*, information on citizenship, attributable interests and adverse findings of law violations) would be required not just for the nominee or nominees whose selection would trigger the majority change, but also for the other new directors on whose qualifications we have not yet ruled.

[47] To the extent that these entities are stuctured and operate analogously to stock corporations, we have proposed analogous treatment. To the extent that material differences exist, but firmly established principles drawn from the stock context appear readily applicable, we have proposed to adapt the existing framework in accordance with such principles.

[48] In this regard, we note that our multiple and cross ownership rules do not apply to noncommercial educational broadcast licensees. Accordingly, the supplemented FCC Form 316 required for Commission consent to an insubstantial transfer of control of a noncommercial educational broadcast station licensed to a non-stock entity need not include information on other media interests.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-211

In the Matter of

Amendment of Section 73.202(b) RM-4740
Table of Allotments
FM Broadcast Stations.
(Santa Isabel, Puerto Rico and
Christiansted, Virgin Islands)

MEMORANDUM OPINION AND ORDER

Adopted: March 31, 1989; Released: April 11, 1989

By the Commission:

1. The Commission has before it (1) the Petitions for Reconsideration filed by Pablo Rodriguez (Rodriguez) and the Amor Family (Amor), (2) the Motion for Extension of Time and (3) the Consolidated Opposition to Petitions for Reconsideration filed by Estereotempo, Inc. (Estereotempo), (4) the Reply to Consolidated Opposition filed by Rodriguez, and (5) the Reply filed by Amor. Rodriguez and Amor seek reconsideration of the Commission action[1] denying their respective applications for review of a Mass Media Bureau *Memorandum Opinion and Order*.[2] That *Memorandum Opinion and Order* denied their respective Petitions for Reconsideration of the Bureau's action dismissing Rodriguez's petition for rule making to allot Class B FM Channel 258 to Santa Isabel, Puerto Rico.[3] Our *Memorandum Opinion and Order* approved the Bureau's policy of refusing to accept a late filed expression of continuing interest in contested allotment rule making proceedings. The Petitions for Reconsideration will be denied.

2. Section 1.115 of the Commission's Rules provides in pertinent part that "[a] petition requesting reconsideration of a ruling which denies an application for review will be entertained only if . . . [t]he petition relies on facts which related to events which have occurred or circumstances which have changed since the last opportunity to present such matters."[4] As new "facts," Petitioners point to (1) two cases recently decided by the Bureau which, they allege, are inconsistent with our *Memorandum Opinion and Order*, and (2), the fact that our *Memorandum Opinion and Order* was apparently prepared by the same staff person who prepared the Bureau's *Memorandum Opinion and Order*, as evidenced by the contact person listed for each item, thereby allegedly violating the Petitioners' due process right to independent Commission review.

3. As to Petitioners' first argument relating to the allegedly inconsistent staff actions in other cases, we do not believe that staff level actions in other cases warrant reconsideration under Section 1.115.[5] The second argument advanced by Rodriguez and Amor, that their due process right to independent Commission review was somehow violated when the same staff member prepared both the Bureau's and the Commission's *Memorandum Opinion and Order*, is entirely without merit. Amor and Rodriguez have stated no grounds for disqualification of the staff member involved, instead relying on the general proposition that any time a staff member prepares documents embodying a staff level and a subsequent Commission level action in the same proceeding, a party's due process right to independent Commission review is violated. However, we previously addressed and resolved the same issue when we denied the American Bar Association's petition to have Section 1.115 amended to simply limit, but not bar, the participation of bureau staff members in the Commission review process where the case at issue previously had been decided by that bureau pursuant to delegated authority.[6] We indicated that our practice of receiving staff recommendations concerning the proper disposition of applications for review is fair, because the ultimate determination remains with the Commission, and because our review procedures guarantee independent scrutiny by the Commissioners, their legal assistants, and other offices and bureaus within the Commission. In addition, we noted that the 1961 Congressional repeal of Section 5(c) of the Communications Act, which had barred staff recommendations in adjudicatory cases, constituted a recognition of the practical necessity of entertaining staff recommendations. We also analyzed our procedures and concluded that they are entirely consistent with principles of administrative due process.[7] Amor and Rodriguez raise no convincing arguments to contradict our earlier findings.

4. Furthermore, Amor's and Rodriguez' contentions are contrary to established case law concerning the scope of independent agencies' discretion to make staffing decisions. *See, e.g., Morgan v. United States*, 298 U.S. 468, 481 (1935) (commissioners entitled to the aid of assistants in discharging their duties). Moreover, Amor and Rodriguez made no showing of bad faith or improper behavior, a showing required to rebut the strong presumption of regularity to which our actions are entitled. *See United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14 (1926); *Hercules, Inc. v. Environmental Protection Agency*, 598 F.2d 91, 123 (D.C. Cir. 1978) (speculative possibility that decision maker accepted the staff's view for an improper reason held insufficient to overcome strong presumption of regularity).

5. Accordingly, IT IS ORDERED, That the Petitions for Reconsideration filed by Pablo Rodriguez and the Amor Family Broadcasting Group ARE DENIED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED. Authority for this action is contained in Sections 4 and 303 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See Memorandum Opinion and Order*, 3 FCC Rcd 2336 (1988).

[2] *See Memorandum Opinion and Order*, 2 FCC Rcd 3453 (1987).

[3] *See Report and Order*, 51 FR 6119 (February 20, 1986).

[4] 47 CFR § 1.115 (g) and (g)(1).

[5] We note further that the two cases cited by Petitioners are distinguishable. In the case of *Camden and Rockland, Maine*, 3 FCC Rcd 3621 (1988), although the *Memorandum Opinion and Order* stated that subsequently withdrawn, late-filed supporting comments from a party other than the original proponent of the new allotment were "accepted" in the face of a conflicting proposal, this statement is misleading since it implies a two-step process by which the Commission first accepts or rejects an expression of interest as it is received, and then, subsequently, considers it on its merits. In fact, the Commission neither accepts nor rejects it until the time of drafting the decision in the particular case. Instead, when an expression of interest is received, e.g. from public commenters, it is filed in the docket for that case. Being thus filed does not indicate that it will be ultimately accepted for consideration. The decision to officially accept or reject it for actual, official consideration is made when the staff member assigned to draft the final order begins to assess the information which has been previously filed in the docket. When the commenter in *Camden* withdrew his late-filed expression of interest prior to the final order stage, the issue of acceptance became moot. Therefore, the language in *Camden* "accepting" the petition was unnecessary, and not of decisional significance. The Commission has clearly set forth its policy of enforcing filing deadlines in circumstances where other parties would be prejudiced or where new service would be unduly delayed. Hence, had the abovementioned commenter not withdrawn his petition, it also would have been rejected, as was the Rodriguez petition. Moreover, the original proponent of the new allotment to Camden did not submit an expression of continuing interest, and consequently, the Bureau dismissed its proposal.

Similarly, in *Roland and Heavener, Oklahoma*, 3 FCC Rcd 2684 (1988), the staff "accepted" for filing a late-filed expression of interest in the face of two conflicting proposals. One opposing party requested the imposition of a site restriction on the petitioner's proposal, and the other requested a conflicting allotment. However, prior to the drafting of the order, the original petitioner accepted the site restriction proposed by the first opposing party, and the staff determined, independent of the original petition, that the second opposing party's proposal could not be granted. Therefore, the *Roland* case appears analogous to uncontested cases in which the Bureau routinely accepts late-filed expressions of continuing interest, in that it would be a waste of resources and, hence, not in the public interest to dismiss an uncontested original petition and then, subsequently, initiate a second proceeding.

[6] *In the Matter of Petition for Rule Making to Amend Section 1.115 of the Commission's Rules*, 48 R.R.2d 55 (1980).

[7] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CENTURY CELLUNET OF JACKSON MSA LIMITED PARTNERSHIP — File No. 02253-CL-L-89

For Authority to cover construction permit for Station KNKA639 in the Domestic Public Cellular Radio Telecommunications operating on Frequency Block B to serve the Jackson, Michigan Metropolitan Statistical Area.

and

Request for Special Temporary Authority to provide cellular service in the Domestic Public Cellular Radio Telecommunications operating on Frequency Block B in the Jackson, Michigan Metropolitan Statistical Area.

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 1989; Released: April 11, 1989

By the Acting Chief, Mobile Services Division:

1. Jackson Cellular, Inc. (JCI) has filed: (1) a Petition for Deferral of Operating Authority (Petition) against the application of Century Cellunet of Jackson MSA Limited Partnership (Century) for a license to cover construction permit for Station KNKA639; (2) Comments in Opposition to Grant of Special Temporary Authority (STA Comments) to provide cellular service; and (3) a Motion for Order to Show Cause involving Century's license (Show Cause Motion). Century has filed oppositions to JCI's Petition and Show Cause Motion and a response to JCI's STA Comments.

BACKGROUND

2. On March 12, 1987, the Mobile Services Division (MSD) granted Century's application to establish a new wireline cellular system to serve the Jackson, Michigan Metropolitan Statistical Area (Jackson MSA).[1] On September 14, 1987, Century filed an application to implement major modifications to the system. The MSD granted this application on November 18, 1987, and on January 19, 1988,[2] Century filed an FCC Form 489 application for an operating license to cover the modified construction permit.[3] Although the license-to-cover application was for an initial operating license, the application stated that it was "[n]ot for initial license." Thus, the application for covering license was not placed on Public Notice and, therefore, interested parties were not given a chance to file petitions to defer operating authority. The covering license was granted on January 20, 1988. On October 18, 1988, the MSD wrote to Century, stating that the initial license-to-cover application could not be found and requested a date-stamped copy of the initial license application. In response to this request, Century on November 1, 1988, refiled a corrected covering license application (which was placed on Public Notice).[4] Simultaneously, Century filed a Request for Special Temporary Authority (STA Request) to allow continued operation of the station pending final Commission action on Century's resubmitted covering license application. The following day, Century informed the Commission that an "inadvertent error" had occurred by including the "not for initial license" language in the license-to-cover application. On November 15, 1988, JCI filed its Petition to Defer requesting that the Commission grant a six-month deferral of the license to provide cellular service. On December 1, 1988, the MSD granted Century a STA Request to continue to provide cellular service through March 1, 1989 (STA Grant).[5]

CONTENTIONS OF THE PARTIES

JCI's arguments

3. JCI argues that based on a projected one-year headstart, a projected three-year cellular service demand in Jackson, and projected effects of several "first mover" advantages, Century would likely make Jackson a single-carrier market and would prevent a competing carrier from entering the Jackson MSA.[6] JCI states that this assertion is supported by a market study produced by Mr. James Montayne, President of Cornell Consulting Group, Inc. (Montayne); a copy of his affidavit was appended to JCI's Petition. JCI asserts that Century's advantages are its established telecommunications reputation and its considerable opportunity to build up a subscriber base from which to recover fixed operating costs. JCI also contends that Century could greatly underprice JCI and could still recover its total costs when JCI enters the market despite the fact that JCI would have to incur additional investment to overcome the effects of late entry into the market. JCI further asserts that JCI's early entry as a resale carrier would not significantly help it to overcome Century's market advantage because Century could manipulate resale rate levels. As headstart time increases, JCI argues that it would have to offer greater incentives in order to have customers switch to JCI's facilities-based system. Additionally, JCI states that due to the uncertain status of the Crossville Investigation, there is less incentive for JCI to immediately enter the market as a resale carrier.

4. JCI next argues that due to the pendency of the Crossville Investigation, the MSD has stopped processing JCI's application and, thus, JCI can not begin service to the Jackson market. Moreover, JCI argues that even if it enters into a reseller agreement with Century, the effects of competing with an ongoing, full-service company are severe and unfair due to JCI's immobilization while its application is not being processed.

5. In its STA Comments, JCI states that it was not served with a copy of Century's STA Request, did not know the request was filed until November 17, 1988, and did not become aware of Century's misrepresentations to the Commission until JCI investigated the basis for the STA request. JCI also asserts: that the MSD erred in

granting the STA because Section 22.25 of the Commission's Rules does not envision STA requests after a station begins operation; that Century did not provide all facts needed to justify the request; and that the MSD grant pursuant to Section 22.25(b)(4) was wrong as a matter of law because Section 22.25(a) is the sole authority for granting STA requests.

6. In its Show Cause Motion, JCI asserts that Century's license to provide cellular service to Jackson should be revoked because: Century has willfully and repeatedly misrepresented material facts concerning its operating status; Century's "[n]ot for initial license" language has not been adequately explained; Century's statement in its November 1 STA request that Century "only recently discovered" this "irregularity" is not credible; and Century's claim that this language was included due to an "inadvertent error" is not plausible because Century took advantage of the erroneous grant by turning on the system and not serving JCI with a copy of its January 19, 1988 notification. JCI also asserts that Commission precedent supports revocation where there was deliberate construction and commencement of operation after permits for frequencies had expired and where parties had operated facilities without proper authorization. JCI further contends that revocation would not deprive the Jackson community of cellular service because the Commission previously has permitted continued operation by the offending operator pending selection of a new licensee. Finally, JCI points out that the Commission could also assess substantial forfeitures against Century.

Century's arguments

7. Century argues that Montayne's assumptions and conclusions are incorrect and, in suppport, has appended a declaration of Antoinette Crowder, a senior analyst with TRANSCOMM, Inc., an engineering and economic consulting firm. Century asserts that cellular markets are much more complex and dynamic than the Montayne affidavit has represented and that many opportunities exist for a later market entrant to obtain market share and earn a profit. Century states that based on its own experience: roamer revenues have the potential to substantially cover fixed costs; first entrants do not receive permanent advantages; another competitor is not precluded from entering either as a reseller or as a facilities-based carrier; and because Century's services to subscribers are highly valued, any suspension would disserve the public interest. Century contends that the first entrant experiences "first-mover" disadvantages. It also argues that a more sophisticated analysis of Montayne's demand study is required. Century takes exception to JCI's statement that resale is likely to be of very minimal importance to a late entrant. Further, it asserts the fact that JCI is being investigated is irrelevant to the headstart issue and does not warrant depriving the public of cellular service.

8. Century argues that JCI's Comments are untimely filed. According to Century, JCI could, and should, have filed its opposition well before the December 1, 1988 STA grant because JCI admits that it received the STA request on November 17, 1988. Century asserts that the MSD was correct in procedurally and substantively granting the STA without the 30-day public notice requirement in order to avoid service disruption.

9. As for JCI's Show Cause Motion, Century argues that it did not engage in any misrepresentations because as soon as it discovered the "[n]ot for initial license" error, it filed a corrective FCC Form 489, served it on JCI, and filed its November 1 STA Request. Century states that, as explained in the appended declaration of David E. Hogan (Hogan), who is President of various companies related to Century[7]: the error was inadvertent; Century was not lacking in candor; and Century had no motive to misrepresent the status of its Jackson system. Century further argues that JCI has completely failed to show any grounds for revoking its license. Moreover, Century asserts, the Commission has imposed sanctions on licensees for far more egregious violations by only issuing a forfeiture or a simple warning without revoking a license.

DISCUSSION

10. The Commission has held that a non-wireline selectee requesting a deferral of early entry into the market of a wireline operator bears a heavy burden of showing that such action would be in the public interest. *See Cellular Communications Systems*, 86 FCC 2d 469, 491 n.57 (1981) (*Cellular Order*), *modified on other grounds*, 89 FCC 2d 58 (1982) (*Cellular Modification Order*), *further modified*, 90 FCC 2d 571 (1982), *petition for review dismissed sub nom. United States v. FCC*, No. 82-1526 (D.C. Cir. Mar. 3, 1983). The Commission emphasized that it only would defer action on a wireline application "[w]here it can be demonstrated in a particular case that harm to the public will result from allowing the wireline carrier an early entry into the market involved." *Cellular Order*, 86 FCC 2d at 492. It was also made clear that no deferral on service would be longer than six months. *Cellular Modification Order*, 89 FCC 2d at 75 n.32. With this background, we turn to the issues surrounding JCI's Petition.

11. JCI has failed to show that the public interest would not be served by Century's early entry because JCI has not sufficiently demonstrated that immediate service to the public is harmful or that competition will be foreclosed.[8] We are not persuaded by Montayne's conclusion that non-wireline competition would be virtually precluded. A wireline carrier is permitted to enter the market first. We find that the Montayne study does not support JCI's desired conclusion because it is flawed in several ways. For example, the Montayne affidavit appears to assume that customers choosing to receive service from the wireline carrier will stay with that carrier even after entry of a second carrier. There has been no basis given for this assumption. *See, e.g., Miami CGSA, Inc.*, Mimeo No. 4507 at n.25 (released May 31, 1984) (new entrants have an incentive to obtain customers from the entrenched wireline operator). We also find that Montanye's conclusion permitting a wireline to have a headstart would cause the non-wireline permittee not to construct its system is unsupported by experience in other markets because such construction and subsequent operation has occurred despite a significant wireline headstart period. Regarding the demand-for-service estimates contained in JCI's economic analysis, it appears that the underlying studies might have been conducted in markets geographically removed from the Jackson MSA having no community of interest with the Jackson MSA. Additionally, the Montayne affidavit on its face reflects that population figures to some degree are an unreliable predictor of the extent of cellular demand in the Jackson MSA because, by Montayne's own admission, much of the recent population growth is due to a growing inmate population at

the Jackson County correctional facility. Montayne affidavit at 5 n.3. As far as resale matters are concerned, JCI's decision not to pursue the resale option is a voluntary business judgment it has made and does not support its argument to delay grant of Century's application to cover. On the contrary, "any carrier can establish a presence in the market through resale as soon as the wireline carrier begins operation, reducing the potential anticompetitive effects of early wireline entry." *Cellular Modification Order*, 89 FCC 2d at 75 n.31. Thus, we reject JCI's competitive barrier arguments.

12. Moreover, we conclude that the pending Crossville Investigation does not warrant our granting JCI's requested deferral and withdraw cellular service from the public in the Jackson MSA. The genesis of the headstart doctrine originally lay in the Commission's recognition that two or more non-wireline applicants vying for the same market would generally be faced with substantial delays in providing service to the public due to the length of time it takes to conduct a comparative hearing whereas a wireline carrier would unlikely be faced by a competing applicant. It was not anticipated that such delay would be the result of a possible criminal investigation of a tentative selectee. Consequently, we do not believe that any headstart petition should be granted based on an investigation centering on possible fraudulent -- and, thus, disqualifying -- factors engaged in by the competing non-wireline applicant. Moreover, any such investigation may well prove to be lengthy, and we do not find it to be in the public interest to withdraw service in the Jackson MSA for what may be a long period of time while the Crossville Investigation continues.

13. Concerning JCI's Comments on the requested STA, we initially note that JCI's non-receipt of a copy of Century's STA Request is not determinative.[9] After acknowledging Century's error in noting that its application was "not for initial license" and the resulting inability to grant interested parties a chance to file petitions to defer, the MSD granted the STA Request pursuant to Section 22.25(b)(4)[10] and specifically stated that it was granted to provide continued service to subscribers. Thus, although Century was providing cellular service when it filed its STA Request, we nonetheless conclude that under the circumstances, granting the STA to allow Century to continue to provide service was in the public interest. We emphasize, however, that our approving the previously granted STA does not establish broad endorsement of an STA grant whereby an applicant begins to operate without any authority and then, realizing its error, seeks an STA to continue operations by justifying the public interest rationale. We note that in the proceeding before us, although Century gave incorrect information on its January 1988 FCC Form 489, the MSD nonetheless did grant Century authority on January 20, 1988, to commence operations. Thus, the STA merely allowed Century to continue to operate under the originally granted authority until resolution of the substantive filings in this proceeding. Moreover, we find that it is in the public interest to grant Century's underlying resubmitted request to cover Century's modified construction permit; consequently, we in turn grant Century's captioned application to cover license.[11]

14. As for JCI's Show Cause Motion, in ascertaining whether Century's inaccurate FCC Form 489 rose to the level of a misrepresentation or lack of candor, we need to look closely to determine if Century intended to deceive the Commission, because the Commission has previously made clear, "both misrepresentation and lack of candor represent deceit . . . ." *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983). Unless there is evidence showing "deceptive intent," the Commission will not find that misrepresentation or lack of candor has occurred. *Id.* The "bare existence of a mistake" in an application, "without any indication that the licensee meant to deceive the Commission, does not elevate such a mistake to the level of an intentional misrepresentation or raise a substantial and material question of fact." *Kaye - Smith Enterprises*, 71 FCC 2d 1402, 1415 (1979).

15. Although the Communications Act of 1934, *as amended*, provides for evidentiary hearings to aid the Commission in furthering its mandate to promote the public interest, parties challenging an application and who seek a hearing (JCI's Show Cause Motion effectively requests such hearing) must satisfy a two-step test established in 47 U.S.C. Sec. 309(d)(1) and (2). *See Astroline Communications Company Limited Partnership*, 857 F.2d 1556, 1557 (D.C. Cir. 1988) (*Astroline*). The protesting party must submit a petition containing "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. Sec. 309(d)(1). The Commission must proceed "on the assumption that the specific facts set forth [in the petition] are true." *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985). If the Commission determines that the petitioning party satisfies the threshold standard, the inquiry proceeds to a second phase. Having found that such party has alleged *prima facie* inconsistency with the public interest, the Commission determines whether, "on the basis of the application, the pleadings filed, or other matters which it may officially notice[,] . . . a substantial and material question of fact is presented." 47 U.S.C. Sec. 309(d)(2). *See also Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987). If the Commission concludes that such a question of fact has been raised, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, it should conduct a hearing in accordance with 47 U.S.C. Section 309(e).

16. In light of the foregoing, we conclude that there is no need to grant JCI's Show Cause Motion in resolving the allegations contained therein. Even assuming *arguendo* that JCI has established a *prima facie* case, namely, that the "[n]ot for initial license" language on Century's FCC Form 489 for Jackson evidenced Century's misrepresentations in an attempt to deceive and, thus, is inconsistent with the public interest when such notation was not truthful, we conclude that JCI has not satisfied the second prong of the test. Contrary to JCI's allegations, Century has adequately explained its incorrect language to our satisfaction without the need for us to resort to a hearing, and JCI has not demonstrated otherwise. In particular, it appears that the inclusion of incorrect language in FCC Form 489 was caused by Century's parent corporation, which was taking steps to implement the construction and operation of other cellular systems licensed to the parent's other subsidiaries. We accept the explanation in the Hogan Declaration at 5 that the notation "[n]ot for initial license" which correctly appeared on the FCC Form 489 applications for Kalamazoo, MI, Benton Harbor, MI, and Monroe, LA, was inadvertently carried over to the Jackson FCC Form 489, which was drafted at the same time.[12] We also accept Hogan's explanation that all four FCC

Form 489s were then presented to Hogan at the same time for review and execution once the appropriate modifications had been completed but that he forgot that Jackson (and the La Crosse, WI market) were the exceptions to the "not for initial license" status, and that he wrongly assumed the initial covering license application for Jackson had already been filed. *Id.* We further accept his explanation that he did not focus enough on the Jackson filing to realize that an initial covering license application had not already been filed, and that Century did not discover the error until the MSD requested Century to provide a date-of-receipt stamped copy of the initial covering license application. *Id.* JCI has provided no rebuttal evidence which would lead us to believe that a material question of fact exists.

17. The Commission has stated previously that the initiation of revocation proceedings through an order to show cause, as permitted by Section 312(a), "is, of course, wholly subject to our discretion." *Tulsa Cable Television*, 68 FCC 2d 869, 877 (1978). In exercising our discretion under this section, we do not believe that initiation of revocation proceedings is warranted in this case. Century's "inadvertent error", while not to be condoned, does not in our view justify the harshest penalty of license revocation. Moreover, we find no evidence of misrepresentation or lack of candor on Century's part or any intention to violate the Commission's Rules or the Communications Act. As discussed above, Century's "[n]ot for initial license" statement appears to have been inadvertently made. In these circumstances, given the fact that Century's incorrect notation does not appear to have been willful and that Century was operating pursuant to Commission authority, we conclude that a monetary forfeiture is similarly not appropriate. At the same time, however, we admonish Century to exercise more care in carrying out its responsibilities as a Commission licensee.

ORDERING PARAGRAPHS

18. Accordingly, IT IS ORDERED that the Petition for Deferral of Operating Authority filed by Jackson Cellular, Inc. IS DENIED.

19. IT IS FURTHER ORDERED that the Motion for Order to Show Cause filed by Jackson Cellular, Inc. IS DENIED.

20. IT IS FURTHER ORDERED that the November 1, 1988 request to cover construction permit for major modification filed by Century Cellunet of Jackson MSA Limited Partnership in File No. 02253-CL-L-89 IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Acting Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Public Notice, Rpt. No. 87-208 (released Mar. 12, 1987).

[2] Public Notice, Rpt. No. 88-29, at 4 (released Nov. 23, 1987).

[3] When a cellular system is ready to be turned on for the first time to commence operations, FCC Form 489 (Notification of Status of Facilities under Part 22 of FCC Rules) is required to be filed. This form is also known as a license-to-cover application. If a non-wireline licensee files its FCC Form 489 to turn on its system, its filing merely serves as notification to the Commission. Nothing further is required, and it may automatically begin operations. If, however, a wireline licensee files its FCC Form 489 to turn on its system, its filing is placed on public notice, and a petition for deferral of the wireline's operating authority is allowed to be filed by an interested party and would be considered by the Commission if the petition were filed within 14 days of the public notice. If no petition to defer is filed, a wireline may then begin operations.

[4] Public Notice, Rpt. No. CL-89-33, at 8 (released Nov. 25, 1988).

[5] *See* Letter to Robert M. Jackson, Esq. (Counsel for Century) from Myron C. Peck, Deputy Chief, Mobile Services Division (Dec. 1, 1988). The STA grant also requested that Century return the January 20, 1988 license to cover. Century in turn did so. On February 16, 1989, Century filed a request for extension of the STA Grant; JCI filed an opposition to the extension request.

[6] JCI became the Jackson MSA non-wireline tentative selectee on December 18, 1986. On May 28, 1987, the Commission wrote to JCI requesting information concerning the preparation of its application in connection with a Commission investigation into an application preparer in Crossville, Tennessee. On June 18, 1987, JCI filed an Offer of Proof in responding to the Commission's letter. The Commission on that day announced that it had commenced the Crossville Investigation. (*See* Public Notice, FCC 87-219 (released June 18, 1987)). On October 6, 1987, the Commission stated that its General Counsel had referred the Crossville matter to the Criminal Division of the Justice Department (DOJ) for possible investigation. (*See* Public Notice, Rpt. No. CL-88-4 (released Oct. 6, 1987)). According to JCI, it has not received any communication from DOJ concerning this matter.

[7] Hogan is: (1) President of Century Cellunet of Jackson, Inc. (CCJI), which is the general partner in Century; (2) President of Century Cellunet, Inc. (CCI), which is the parent corporation of CCJI; and (3) the President of Business Group of Century Enterprises, Inc. (CTEI), which is the parent of CCI. Wholly-owned subsidiaries of CCI comprise wireline licensees in two MSA markets; wholly-owned subsidiaries of CCI are the general partners in the wireline cellular systems authorized to serve ten MSA markets. Hereinafter, CTEI and its various cellular subsidiaries and affiliates are collectively referred to as "Century Group".

[8] The Commission's goal is not to guarantee the economic well-being of an applicant or licensee, but rather to advance the public interest in obtaining reliable, economic cellular service as soon as possible. *See* U.S. v. FCC, 652 F. 2d 72, 88, and 104 (D.C. Cir. 1980); *Cellular Order*, 86 FCC 2d at 491; *Cellular Modification Order*, 89 FCC 2d at 74-75; Advanced Mobile Phone Service, Inc., 93 FCC 2d 683, 690 (1983).

[9] Section 22.25(b) begins: "Special temporary authorizations may be granted without regard to the 30-day public notice requirements . . . ."

[10] Section 22.25(b)(4) provides: "The authorization is made upon a finding that there are extraordinary circumstances requiring operation in the public interest and that delay in the institution of such service would seriously prejudice the public interest."

[11] Century's STA extension request (*see* note 5, *supra)* is thus moot.

[12] Hogan explains that all of the systems in the beyond-120 MSA markets of Century Group needed modifications, and permissive modifications could be made to all of the systems except those of Jackson and La Crosse, WI, which would allow the filing and grant of initial covering license applications prior to the grant of the major modification applications. Hogan Declaration at 4.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

SYRACUSE SMSA LIMITED PARTNERSHIP — File No. 01793-CL-MP-89

For Authority to Construct an Additional Base Station facility for Station KNKA 238 to Operate on Frequency Block A in the Domestic Public Cellular Radio Telecommunications Service at Tully, NY

MEMORANDUM OPINION AND ORDER

Adopted: March 31, 1989; Released: April 11, 1989

By the Acting Chief, Mobile Services Division:

1. Syracuse SMSA Limited Partnership (Syracuse SMSA) requests authority to construct an additional base station transmitter at Tully, NY, which would extend Syracuse SMSA's currently authorized CGSA beyond the MSA boundaries. Syracuse Telephone Company (Syracuse Telco) has filed comments with respect to the captioned application of Syracuse SMSA. Syracuse SMSA has filed a motion for expedited consideration of its captioned application, and Syracuse Telco filed comments to the motion.[1]

CONTENTIONS OF THE PARTIES

2. In its comments, Syracuse Telco states that it recognizes the need for coverage of the area to be served by Syracuse SMSA's captioned application. However, Syracuse Telco asks that grant of Syracuse SMSA's captioned application be conditioned upon Commission approval of Syracuse Telco's own application which has proposed construction and coverage substantially similar to that contained in Syracuse SMSA's application.

3. In its motion, Syracuse SMSA states that although it has no objection to the grant of Syracuse Telco's application, Syracuse Telco's application should be judged on its own merits and must be considered separate and apart from Syracuse SMSA's application.

DISCUSSION

4. Subsequent to the parties' filings in the proceeding before us, Syracuse Telco's application was granted. *See* Public Notice, Rpt. No. CL-89-57, Mimeo No. 1033 (released Dec. 23, 1988) at 9. Consequently, we find Syracuse Telco's comments as well as Syracuse SMSA's motion to be moot.

5. In *Procedures Update*, 52 Rad. Reg. 2d (P&F) 725 (1982), *aff'd., Cellular Radio Service*, 56 Rad. Reg. 2d (P&F) 1583 (1984) and in Section 22.903(a) of the Commission's Rules, the Commission established guidelines for configuring 39 dBu contours. It stated that 39 dBu contours should be contained entirely within the MSA or NECMA and that any minor extension would not render an application defective if the application included "a specific explanation of why it was necessary to engineer the particular cell(s) such that the 39 dBu contours could not be kept entirely within the SMSA (or NECMA)."

6. Therefore, the basis for allowing extensions beyond an MSA was to permit a licensee to provide adequate coverage within the MSA for which it was licensed. It has not been Commission policy to allow a licensee to obtain an extension to provide service beyond the MSA. In reviewing Syracuse SMSA's captioned application, we observe that Syracuse SMSA's certification states, among other things, that its "proposed Tully transmitter will extend into non-MSA Cayuga County and Cortland County . . . [and] [t]he expanded CGSA [is] "to . . . allow for expanded service along Interstate 81 . . . ." Thus, a major reason for Syracuse SMSA's expansion is to extend coverage into these two counties, which are part of an RSA which has not yet been licensed. We grant *de minimis* extensions beyond an applicant's MSA only when the applicant has provided an engineering justification for a *de minimis* extension in order to better serve areas within its MSA. Here, Syracuse SMSA's rationale in support of its extension is to provide service beyond its MSA.[2] Therefore, we can not permit Syracuse SMSA's requested extension and, thus, we find Syracuse SMSA's application defective.

ORDERING PARAGRAPH

7. ACCORDINGLY, IT IS ORDERED, pursuant to Section 0.291 of the Commission's Rules, that the application of Syracuse SMSA Limited Partnership, File No. 01793-CL-MP-88, IS RETURNED AS DEFECTIVE.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Acting Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Syracuse Telco is the non-wireline licensee for the New York MSA, and Syracuse SMSA is the wireline licensee for the New York MSA.

[2] Syracuse Telco, on the other hand, in justifying its requested 39 dBu extension, specified that "[t]he purpose . . . is to enhance coverage of Interstate 81 in the southern part of the MSA . . . ." It appears that Syracuse SMSA, however, wants to provide service beyond the MSA and into an RSA.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Revision of Part 73, Subpart G
of the rules concerning the
Emergency Broadcast System (EBS)

ORDER

Adopted: January 31, 1989; Released: April 11, 1989

By the Commission:

1. The Commission has determined that Part 73, Subpart G contains a few outdated, unnecessary or unclear provisions concerning the Emergency Broadcast System (EBS). Amendment of these provisions will reduce confusion.

2. In a filing received by the Commission on July 15, 1988, Hammett and Edison, Inc., Consulting Engineers, requested an informal declaratory ruling as to whether or not Section 73.932(d) of the rules requires an entry in a station log if the check required by Section 73.932(c) reveals no defect in the station's own EBS monitoring receiver equipment. The rules provide that appropriate entries must be made consistently in the station log concerning EBS tests received and transmitted by broadcast stations (Section 73.962). Stations must also determine the cause of any failure to receive the Weekly Transmission Tests (Section 73.932(c)). If the equipment for receiving the Attention Signal and emergency programming becomes defective, appropriate entries must be made in the station log, indicating reasons why Weekly Test Transmissions were not received (Section 73.932(d)). It is not clear whether a station should make an entry indicating reasons why Weekly Test Transmissions were not received if the sending station fails to transmit the required signal. While the rules are not precise in this regard, the EBS Checklist for both "Participating" and "Non-participating" EBS stations, which is incorporated into the rules, *see* 47 C.F.R. §73.908, contains a section which states the following: "You should receive a test or activation each week. If you do not, you are responsible for determining why and making appropriate notations in your records or logs and/or taking corrective action." We are moving the language in Section 73. 932(d)(1) from its present position to Section 73.932(c) to make it absolutely clear that an entry in the log is required as originally intended regardless of the reason for failure to receive an Emergency Broadcast System weekly test.

3. Another change will eliminate unnecessary paperwork. Section 73.962 of the rules now provides for "Closed Circuit Tests" (CCT) of the Emergency Broadcast System not more than once a month and not less than once every three months only after FCC approval. The "FCC approval" is in the form of an Order which is issued by the Managing Director and published in the Federal Register each time a CCT is conducted. In addition to the above, the Managing Director sends a telegram to all participating major radio networks advising them of the forthcoming CCT and the week in which it will be conducted. An Order and publication in the Federal Register is superfluous. The action by the participants is voluntary and the Order and publication serve no useful purpose other than notification. The telegram is adequate for this purpose.

4. Section 73.912 of the rules is revised to include all radio, television and cable networks, program suppliers, wire services and common carriers that voluntarily participate in the EBS.

5. Section 73.926(d) of the rules is also updated to recognize that additional radio, satellite, and wire service networks may voluntarily participate in EBS at the state and local levels.

6. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 1, 4(i), 4(o) and 303(r) of the Communications Act of 1934, as amended, Part 73 of the Commission's rules IS AMENDED, as set forth below, effective **February 15, 1989.**

7. Because these changes are minor and therefore noncontroversial, the Commission finds for good cause that prior notice and comment procedures are unnecessary. *See* 5 U.S.C. §553(b)(B).

8. The rule changes contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not decrease burden hours imposed on the public.

9. For further information concerning this action, contact Raymond W. Seddon of the Management Planning and Program Evaluation Office at (202) 632-3906.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Title 47 of the Code of Federal Regulations, Part 73, is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. Section 73.912 is revised in its entirety to read as follows:

§73.912 Emergency Broadcast System Participants.

The following non-government industry entities voluntarily participate in the Emergency Broadcast System (EBS):

(a) Radio and Television Networks.

1. ABC Radio and ABC-TV.
2. Associated Press Radio (APR).
3. CBS Radio and CBS-TV.
4. Mutual Broadcasting System (MBS).
5. MUZAK.
6. NBC Radio.
7. NBC-TV.
8. National Public Radio (NPR).
9. Public Broadcasting Service (PBS-TV).
10. Satellite Music Network.
11. Transtar.
12. United Press International Audio (UPIA).
13. United Stations.

(b) Cable Networks and Program Suppliers.

1. Cable News Network (CNN).
2. Christian Broadcasting Network (CBN).
3. Cinemax.
4. Disney Channel.
5. Entertainment and Sports Programming Network (ESPN).
6. Home Box Office (HBO).
7. Movie Channel.
8. MTV.
9. Nashville Network.
10. Nickelodean.
11. Showtime.
12. VH-1.
13. Weather Channel.

(c) Wire Services.

1. Associated Press (AP).
2. United Press International (UPI).

(d) Common Carriers.

1. American Telephone and Telegraph (AT&T).

3. Section 73.926 is amended by revising paragraph (d) to read as follows:

§73.926 Participation in the Emergency Broadcast System.

* * * * *

(d) Any AM, FM, TV, or Low Power TV broadcast station or cable, satellite, wire or radio network or system may, at the discretion of management, voluntarily participate in the State level and Operational (Local) level EBS in accordance with the provisions of the State EBS Operational Plan. An EBS Authorization is not required.

4. Section 73.932 is amended by revising paragraphs (c) and (d) to read as follows:

§73.932 Radio monitoring and Attention Signal transmission requirements.

* * * * *

(c) The licensee has the responsibility to insure that the equipment used for off-the-air signal monitoring and generating the EBS Attention Signal is in functioning condition during all times the station is in operation, and to determine the cause of any failure to receive the Weekly Transmission Tests as described in paragraph (c) of § 73.961. Appropriate entries must be made in the station log, indicating reasons why the Weekly Test Transmissions were not received.

(d) In the event that the equipment for receiving the Attention Signal and emergency programming transmitted by other broadcast stations, or the equipment for generating the Attention Signal becomes defective, the station may operate without the defective equipment pending its repair or replacement for a period not in excess of 60 days without further authority of the Commission, provided that appropriate entries are made in the station log showing the date and the time the equipment was removed and restored to service. Weekly Test Transmissions of the Test Script, without the equipment for generating the Attention Signal, must be still be conducted.

5. Section 73.962 is amended by revising paragraph (a) to read as follows:

§73.962 Closed Circuit Tests of approved National level interconnecting systems and facilities of the Emergency Broadcast System.

(a) Tests of approved National level interconnecting systems and facilities of non-government entities voluntarily participating in the EBS will be conducted on a random or scheduled basis not more than once a month and not less than once every three months. The time of the test will be selected by both the White House and participating industry personnel in coordination with the FCC. Unless a random Closed Circuit Test has been selected, the FCC will notify the networks, wire services and participating cable systems and common carriers of the selected time window, four working days (holidays excluded) prior to the test.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MARCH 29, 1989
LETTER

Released: April 5, 1989

Re: File No. BALH-881216GQ

J. Geoffrey Bentley, Esq.
Birch, Horton, Bittner, Cherot and
Anderson
1155 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20036

Dear Mr. Bentley:

This letter responds to the "Motion to Return Unauthorized Ex Parte Communication" (Motion), filed on behalf of David W. Wrinkle (Wrinkle) in the above-referenced proceeding. We also have before us the "Response to Motion to Return Unauthorized Ex Parte Communication," filed by station KBYG, and the "Joint Comments on 'Response to Motion to Return Unauthorized Ex Parte Communication,'" filed on behalf of Wrinkle and Big Spring Broadcasting Co. (Big Spring).

By way of background, on January 12, 1989, KBYG filed a petition to deny the application for assignment of KWKI-FM, Big Spring, Texas, from Big Spring to Wrinkle. Although the petition to deny was date stamped as received in the Commission's Mail Room on January 12, 1989, KBYG subsequently was informed in a telephone conversation with a Commission staff person that that staff person had not received his copy. Accordingly, on January 27, 1989, KBYG filed with the Secretary a letter to the Commission staff person providing an additional copy of the petition to deny and providing supplemental information regarding its opposition to the assignment application. While the petition to deny did not include a certificate of service, KBYG claims that it did in fact serve its petition to deny on both Big Spring and Wrinkle. Big Spring and Wrinkle deny receiving service copies of the petition to deny. KBYG has not claimed that it served its supplemental letter to Commission staff on the parties.

In its Motion, which was directed to the Managing Director, Wrinkle claims that the petition to deny, the telephone conversation with Commission staff and the supplemental letter all constituted prohibited *ex parte* presentations by KBYG.[1]

Because the assertions of the various parties are not necessarily inconsistent, we will assume for purposes of this letter that all are true. Thus, we will assume that KBYG did serve its petition to deny, as required by 47 U.S.C. § 309(d)(1), although it was not received by Big Spring or Wrinkle. The petition to deny thus constituted a formal opposition under the Commission's *ex parte* rules and rendered the proceeding restricted from that point forward. 47 C.F.R. §§ 1.1202, 1.1208.[2]

KBYG's telephone conversation with Commission staff regarding whether its petition to deny had been received obviously did not constitute an *ex parte* presentation, as it did not relate to the merits or outcome of the proceeding. *See* 47 C.F.R. § 1.1202(a). Its supplemental letter did, however, violate the *ex parte* rules, as it both addressed the merits of the proceeding and was not served on the other parties. *See* 47 C.F.R. §§ 1.1202, 1.1208.

There is no evidence before us that KBYG's violation of the *ex parte* rules was intentional or that it prejudiced Big Spring or Wrinkle. Big Spring and Wrinkle each had copies of KBYG's supplemental letter at the time they filed their oppositions to the petition to deny and each addressed the allegations therein. Subsequently, the Chief, Audio Services Division, Mass Media Bureau, denied the petition to deny (which he treated as an informal objection), and granted the assignment application.

Letter to Dick G. Fields from Larry D. Eads, March 10, 1989. Accordingly, while we caution KBYG to exercise more care with respect to its responsibilities under the Commission's *ex parte* rules, we will not recommend to the Commission that any sanctions be imposed.

Sincerely,

Edward J. Minkel
Managing Director

FOOTNOTES

[1] In its Motion, Wrinkle also requests that the petition to deny be summarily returned for including "scandalous" allegations. The Managing Director has no authority to consider such a request.

[2] Even if the petition to deny had not been served, it would not have violated the *ex parte* rules. Contrary to Wrinkle's suggestion, Motion at 2, written, as opposed to oral informal (unserved) objections do not violate the Commission's *ex parte* rules. *See* 47 C.F.R. § 1.1204 (a)(2) Note; *Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations,* 2 FCC Rcd 3011, 3015, *on reconsideration,* 2 FCC Rcd 6053 (1987). The language quoted by Wrinkle relates only to oral presentations by informal objectors.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Part 2 to Add Footnote US311 to Recognize Radio Astronomy Observatories in the 1350-1400 MHz Band

ORDER

Adopted: March 3, 1989; Released: April 12, 1989

By the Chief Engineer:

1. On August 24, 1988, the National Telecommunications and Information Administration approved a new footnote US311 to the U.S. Government Table of Frequency Allocations. Footnote US311 will recognize specific radio astronomy observatories operating in the 1350-1400 MHz band. The 1350-1400 MHz band is allocated to the Government radiolocation service on a primary basis and the Government fixed and mobile services on a secondary basis. The new footnote will urge Government administrations to exercise caution when making assignments in this band that may affect radio astronomy observations. There is no non-Government allocation in this band.

2. No non-Government entities are affected by the new footnote. Accordingly, IT IS ORDERED that Section 2.106 of the Commission's Rules, 47 CFR Section 2.106, is amended by listing footnote US311 in column 4 for the 1350-1400 MHz band and by adding the text of footnote US311 to the list of footnotes at the end of the table. This action is taken pursuant to the authority of 47 U.S.C. Sections 154(i), 302 and 303, and pursuant to authority delegated to the Chief Engineer in Section 0.241 of the Commission's Rules. Because the addition of footnote US311 is nonsubstantive, the notice and comment provisions as well as the effective date requirements of the Administrative Procedure Act are inapplicable. This action becomes effective immediately.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

Appendix

Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

Section 2.106, the Table of Frequency Allocations, is amended by listing footnote US311 in columnn 4 for the 1350-1400 MHz band and adding the text of footnote US311 to the list of footnotes at the end of the table as follows:

Section 2.106 *Table of Frequency Allocations*

United States table

Government Allocation (MHz) (4)
* * *
1350-1400
RADIOLOCATION.
Fixed.
Mobile.
714 718 720
G2 G27 G114
US311
* * *

* * * * *

United States (US) Footnotes

* * * * *

US311 - Radio astronomy observations may be made in the 1350-1400 MHz band on an unprotected basis at certain Radio Astronomy Observatories indicated below:

National Astronomy and Ionosphere Center Arecibo, Puerto Rico	Rectangle between latitudes 17^0 30'N and 19^0 00'N and between longitudes 65^0 10'W and 68^0 00'W.
National Radio Astronomy Observatory Socorro, New Mexico	Rectangle between latitudes 32^0 30'N and 35^0 30'N and between longitudes 106^0 00'W and 109^0 00'W.

National Radio Astronomy Observatory Green Bank, West Virginia	Rectangle between latitudes 37^0 30'N and 39^0 15'N and between longitudes 78^0 30'W and 80^0 30'W.
National Radio Astronomy Observatory Very Long Baseline Array stations:	50 mile radius circles centered on:

	Latitude (North)	Longitude (West)
Pie Town, NM	34^0 18'	108^0 07'
Kitt Peak, AZ	31^0 57'	111^0 37'
Los Alamos, NM	35^0 47'	106^0 15'
Fort Davis, Tx	30^0 38'	103^0 57'
North Liberty, IA	41^0 46'	91^0 34'
Brewster, WA	48^0 08'	119^0 41'
Owens Valley, CA	37^0 14'	118^0 17'
Saint Croix, VI	17^0 46'	64^0 35'
Mauna Kea, HI	19^0 49'	155^0 28'
Hancock, NH	42^0 56'	71^0 59'

Every practicable effort will be made to avoid the assignment of frequencies in the band 1350-1400 MHz to stations in the fixed and mobile services which could interfere with radio astronomy observations within the geographic areas given above. In addition, every practicable effort will be made to avoid assignment of frequencies in this band to stations in the aeronautical mobile service which operate outside of those geographic areas, but which may cause harmful interference to the listed observatories. Should such assignments result in harmful interference to these observatories, the situation will be remedied to the extent practicable.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

San Francisco Eyes, Inc.,
Complainant,

v. File No. E-88-74

US Sprint Communications Company,
Defendant.

ORDER

Adopted: April 4, 1989; Released: April 12, 1989

By the Acting Chief, Enforcement Division, Common Carrier Bureau:

1. This proceeding was initiated on June 3, 1988, by a formal complaint filed by San Francisco Eyes, Inc. (complainant) against US Sprint Communication Company (US Sprint). The complaint alleges that in the course of a billing dispute, US Sprint wrongfully disconnected complainant's "800 Service" long distance telephone service without prior written notice in violation of its tariff. Complainant requested the Commission to order US Sprint to reinstate its "800 Service" and to pay damages and penalties.

2. US Sprint did not file an answer to the complaint because the parties negotiated a settlement and signed a "Full and Complete Release", a copy of which was received by the Commission on January 23, 1989.[1] Accordingly, on January 31, 1989, we notified complainant that it was our understanding that US Sprint had satisfied San Francisco Eyes' complaint. We further stated that if complainant wanted to prosecute its complaint it should notify the Commission before March 1, 1989, after which the complaint would be dismissed for failure to prosecute.[2] No response has been received.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in 47 C.F.R. § 0.291, that the complaint filed by San Francisco Eyes, Inc. in this matter IS DISMISSED for failure to prosecute and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Acting Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] *See* letter to Enforcement Division, Common Carrier Bureau, from Thomas A. Grimaldi (Jan. 18, 1989).

[2] *See* letter from Gregory J. Vogt to James B. Newton, III (Jan. 31, 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

Mobile Marine Radio, Inc.,
Complainant,

v. File No. E-88-112

Communications Satellite
Corporation,
Defendant.

ORDER

Adopted: January 5, 1989; Released: April 12, 1989

By the Chief, Enforcement Division, Common Carrier Bureau:

1. We have before us a joint motion filed on December 14, 1988, by Mobile Marine Radio, Inc. (Mobile Marine) and the Communications Satellite Corporation (COMSAT), requesting that we dismiss the above-captioned proceeding in view of the parties' agreement to settle all issues raised in the matter. For the reasons set out herein, we grant the joint motion.

2. This proceeding was initiated by Mobile Marine by a formal complaint filed on August 9, 1988 alleging, *inter alia*, that COMSAT's de-tariffing of its MARIPRESS service on July 12, 1988 resulted in rates that are unjust and unreasonable pursuant to Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). COMSAT denied all of Mobile Marine's allegations. Following a conference held under the aegis of the Enforcement Division and pursuant to 47 C.F.R.§ 1.732, the parties reached a settlement.

3. Mobile Marine and COMSAT represent that their settlement agreement resolves all claims alleged in the complaint in a manner acceptable to both parties. They further state that grant of the joint motion will terminate the proceeding in a manner acceptable to both parties and conserve the resources of the parties and the Commission.

4. On the basis of the statements contained in the parties' motion, we conclude that there are no longer issues in controversy and the proceeding should be terminated.

5. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss filed by Mobile Marine Radio, Inc. and the Communications Satellite Corporation IS GRANTED.

6. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTERN UNION CORPORATION,
Complainant,

v.

SOUTHERN NEW ENGLAND TELEPHONE COMPANY,	File No. E-89-75
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-76
NEVADA BELL,	File No. E-89-77
CINCINNATI BELL TELEPHONE COMPANY,	File No. E-89-78
NEW YORK TELEPHONE COMPANY,	File No. E-89-79
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-80
PACIFIC BELL,	File No. E-89-81
THE MOUNTAIN STATES TELEPHONE COMPANY,	File No. E-89-128
NORTHWESTERN BELL TELEPHONE COMPANY,	
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	
ILLINOIS BELL TELEPHONE COMPANY,	File No. E-89-129
INDIANA BELL TELEPHONE COMPANY, INC.,	
MICHIGAN BELL TELEPHONE COMPANY,	
THE OHIO BELL TELEPHONE COMPANY,	
WISCONSIN BELL, INC.,	
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-130
SOUTH CENTRAL BELL TELEPHONE COMPANY,	
BELL ATLANTIC CORPORATION,	File No. E-89-131
GTE TELEPHONE OPERATING COMPANIES,	File No. E-89-132

Defendants.

ORDER

Adopted: April 5, 1989; Released: April 12, 1989

By the Acting Chief, Enforcement Division, Common Carrier Bureau:

1. The parties to the above-captioned formal complaints have filed a joint motion for continuance, seeking postponement of deadlines for filing answers and other responsive pleadings. For the reasons set out herein, we deny the requests for continuance.

2. The parties state that they filed the above-captioned formal complaints as "contingent" upon the outcome of the Commission's determination in the Western Union Remand proceeding. *Western Union Corp. v. FCC*, 856 F.2d 315 (D.C. Cir. 1988), *remanding Investigation of Special Access Tariffs of Local Exchange Carriers*, CC Docket No. 85-166 - Phase I, FCC 86-52, (released Jan. 24, 1986), *recon. den., Order Denying Reconsideration*, 1 FCC Rcd 427 (1986). They explain that essentially the same parties are the principals in both the remand and the complaint proceedings. The parties stipulate that "the Commission's disposition of the issues pending in the Remand proceeding likely will contribute materially to the expeditious processing and resolution of the various complaint proceedings." Joint Motion for a Continuance at ¶ 3. They further argue that "continuances will promote efficient utilization of resources and provide logical consideration of the issues." *Id.* at ¶ 4. The parties anticipate that the Bureau will find these complaints subject to the expedited processing requirements of the Federal Communications Commission Authorization Act of 1988 (FCCAA), Pub. L. No. 100-594, 102 STAT. 3021, 3023 § 8 (Nov. 3, 1988).[1] Therefore, they argue that the purpose of that statute was to protect complainants from unnecessary delay, but here the parties do not oppose the delay necessary to dispose of the Remand proceeding issues.

3. The Bureau has previously rejected similar arguments for continuances of complaints pending Commission action in related proceedings. *Illinois Bell Telephone Company v. American Telephone and Telegraph Company*, DA No. 89-345 (released Apr. 4, 1989), and the parties have provided no basis for granting continuances not previously considered and denied. Thus, good cause has not been shown why the instant Motion should be granted.

4. Accordingly, IT IS ORDERED, pursuant to the authority delegated in 47 C.F.R. § 0.291, that the Joint Motion for a Continuance filed by the parties in the above-captioned formal complaints is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Acting Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] The FCCAA, *inter alia*, amended Section 208 of the Communications Act to require that complaints which relate to "the lawfulness of a charge, classification, regulation, or practice" of a communications common carrier shall be resolved by the Commission, by issuance of a final, appealable order, within 12 months of the filing of such complaints, or within 15 months thereafter in cases which present questions of fact of "extraordinary complexity." 47 U.S.C. § 208(b)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T 900 Dial-It Services and Third Party Billing and Collection Services. File No. ENF-88-05

MEMORANDUM OPINION AND ORDER

Adopted: April 4, 1989; Released: April 12, 1989

By the Chief, Common Carrier Bureau:

1. This interpretative ruling addresses three issues involving AT&T's 900 Dial-It services, currently offered pursuant to AT&T Tariff No. 1, § 5.1, *et seq.*[1] These issues are

1. Whether 900 service offerings should be classified as common carrier service;

2. Whether associated billing and collection services are a common carrier offering; and

3. Whether mixed offerings of tariffed and non-tariffed functions involving 900 service require additional guidelines to assure proper regulatory treatment of these services.

The aforesaid matters have been brought to our attention by members of Congress during hearings[2] and by correspondence from parties with business or related interests in the provision of 900 services. [3]

2. Apparently, some AT&T 900 Dial-It service subscribers currently receive a mixed package of tariffed and non-tariffed services from AT&T, and this has the potential to cause marketplace confusion absent guidance from us as to the proper regulatory treatment of these services. As set out herein, we confirm that based on current law and regulation, certain AT&T 900 Dial-It services are common carrier services which AT&T must continue to offer pursuant to tariff. We find that other AT&T 900 Dial-It services are enhanced services pursuant to that definition contained in 47 C.F.R. § 64.702(a) and, as a result, must be detariffed and offered competitively in conformity with those guidelines developed by the Commission in the *Third Computer Inquiry* (Computer III).[4] We also find that AT&T Premium Billing arrangements offered to Dial-It 900 service sponsor/subscribers are not common carrier communications services and, for the reasons set out herein, should continue to be offered on a non-tariffed basis.

I. *AT & T Dial - It 900 Services*

A. *Background*

3. The Commission first considered the proper regulatory treatment of mass calling services, including AT&T-offered Dial-It 900 services, in the *Second Computer Inquiry* (Computer II).[5] Pursuant to that inquiry, the Commission distinguished basic transmission service, defined as "the common carrier offering of transmission capacity for the movement of information between two points"[6] (basic service), from enhanced services which utilize underlying basic service for the provision of various information services, including information storage and retrieval services.[7] In the *Reconsideration Order* in Computer II, the Commission determined that AT&T Dial-It 900 services fell squarely within the definition of enhanced services since Dial-It 900 services, as then configured by AT&T, provided subscribers with information, stored in the AT&T network, and allowed subscriber interaction with such network-stored subscriber information.[8] At the same time, the Commission recognized that Dial-It service included certain "network control" features properly associated with basic service and tariffable as such.[9] As configured in the AT&T tariff, however, the Commission found 900 service to be enhanced and thus, properly detariffed.[10]

4. Thereafter, AT&T filed tariff revisions designed to allow continued provision of Dial-It 900 service as a basic service in conformance with the Commission's findings. AT&T's modifications included, *inter alia*, reconfiguring certain Dial-It 900 services so that stored or live information would be transmitted directly from sponsor premises rather than from a point within AT&T's network. In filing its revised tariff, AT&T requested, alternatively, that, if the Commission still concluded that Dial-It 900 service was enhanced, the company should be allowed an "indefinite extension" of the detariffing date mandated by the Commission's Computer II decision because "as a practical matter, [Dial-It 900 service] can only be provided over the public switched network."[11]

5. The Common Carrier Bureau (Bureau) responded to AT&T's Dial-It 900 service tariff modifications by letter dated October 21, 1982. The Bureau noted the AT&T tariff modifications and offered that, "upon initial analysis, it appears that [AT&T] modifications to the service do change some of the features which led the Commission to classify Dial-It as enhanced . . . ."[12] However, the Bureau also noted concern whether all aspects of AT&T Dial-It 900 service comported with Computer II guidelines.[13] The Bureau did not make a specific finding that the offering was basic service, but permitted the tariff to go into effect. The Bureau requested AT&T to submit information one year thereafter concerning service development and revenues earned, and declared that if, in practice, revised Dial-It 900 service did not conform to Computer II requirements, "appropriate corrective measures must be undertaken absent any waiver of Commission rules."[14]

6. The questions raised by Congress and the Ondulich informal complaint, *supra*, raised additional concerns with respect to the proper regulatory treatment of Dial-It 900 services. As part of its inquiry, the Bureau addressed various questions to AT&T about Dial-It 900 services and associated billing and collection services. The Bureau stipulated that it would submit AT&T's responses for public comment.[15] The inquiry requested AT&T, *inter alia*, to:

Explain AT&T's position with respect to whether 900 service should be classified as a basic or as an enhanced service. In your response, describe (a) the facilities involved in providing 900 services and the function(s) these facilities perform in providing this service, (b) the extent to which the storage and interactive functions associated with AT&T's 900 service are being performed by AT&T rather than the message provider, (c) the manner in which 900 services and competing services are offered to the public, and (d) the state of competition for services for which demand can be viewed as cross-elastic with 900 services.[16]

7. The Bureau also asked AT&T to explain why it tariffed promotional compensation offered to Dial-It 900 Service subscribers. On April 4, 1988, the Commission issued a Public Notice announcing AT&T's response to the Bureau's letter of inquiry and soliciting public comment.[17] Three parties submitted comments in response to the Public Notice.[18]

B. ***AT & T Response***

8. In its response to the Bureau, AT&T describes two types of Dial-It 900 services and argues that both should be considered basic services.

9. The first type of Dial-It 900 service described is termed "Information Arrangements" by AT&T. Pursuant to an Information Arrangement, according to AT&T, the sponsor/subscriber's message "originates from the sponsor's premises and is recorded and stored by the sponsor using a simple tape recorder or other customer premises equipment [CPE]."[19] The sponsor plays its message continuously over the AT&T network. Within the network, the sponsor message is directed to AT&T's Operations DIAL-IT Administration Center, a central provisioning point located in Kansas City, Missouri. From the center, the sponsor's message is distributed, by private line, to eight mass announcement system nodes which consist of specially-equipped 4ESS switches. Equipment and programming at the nodes allow 896 callers, per node, to simultaneously listen to the sponsor's message, thus allowing for a network-wide capacity of 7,168 simultaneous calls.[20]

10. All sponsors subscribing to AT&T Information Arrangements share the 896 available ports at each node, while mass announcement system programming ensures that callers only access the particular sponsor program which is dialed. AT&T declares that this mass announcement configuration "does not permit any interaction between callers and information stored in the network."[21] Finally, AT&T argues that "[the] fact that the sponsor messages are stored outside AT&T's network confirms that DIAL-IT 900 Service Information Arrangements do not fall within the 'enhanced services' definition."[22]

11. The second type of Dial-It 900 service provided by AT&T is described as "Call Count Arrangements" by AT&T. Pursuant to Call Count Arrangements, AT&T provides sponsor/subscribers with two or more 900 numbers, each of which corresponds to a specified choice, for example, a "yes" or a "no" answer to a sponsor/subscriber query or poll. Calls to each 900 number are counted by AT&T, and the results are presented to the sponsor/subscriber. Callers receive a generic message, from within the AT&T network, which informs the caller that the call has been completed.[23] AT&T maintains that this call acknowledgement cannot constitute an enhanced service since the message amounts to call completion communications, and the Commission has held that the enhanced services definition does not extend "to communications between a subscriber and the network itself for call setup, call routing, call cessation, calling or called party identification, billing and accounting."[24] AT&T discloses that the network capacity of Call Count Arrangements is 28,000 calls per minute employing its eight nodes, or 108,000 calls per minute utilizing the additional 12 mini-nodes.[25]

12. Finally, AT&T states that virtually all interexchange carriers' [IXC's] switched services, including 800 and MTS-like services are "potentially competitive" with Information Arrangements, while noting that such other switched services provide neither the simultaneous mass announcement capacity of AT&T Dial-It 900 service nor the call count feature.[26] AT&T also notes that various Bell Operating Companies (BOCs) have begun offering 900 exchange access service that allows IXCs to provide originating 900 mass calling services and that other local exchange carriers (LECs) can be expected to follow suit, thus promoting 900 mass announcement service competition.[27]

C. ***Commenting Parties***

13. The commenters who addressed the question of the proper regulatory treatment of Dial-It 900 service generally support AT&T's argument that such services are basic rather than enhanced.[28] Centel argues that AT&T's Information Arrangements clearly are not enhanced services since the recorded announcement originates from the sponsor/subscriber's premises; there is no "discernible" interaction between callers and the networks; and computer applications are not utilized to process information as defined under 47 C.F.R. § 64.702(a).[29] Similarly, Centel submits that AT&T's Call Count Arrangement is not an enhanced service since the only interaction between callers and the network is for call termination or cessation purposes.[30]

14. Telesphere agrees that AT&T's role in providing 900 services "may be that of a provider of basic services," but urges us not to conclude that, for this reason, all end-to-end 900 services should be classified as basic.[31] Specifically, Telesphere states that the Commission previously has found both storage and retrieval services and call counting services to be enhanced where such services were provided within the network.[32] Given this finding, Telesphere urges us to rule "that 900 services are enhanced when the provider of the storage, retrieval, interaction, and processing features orders and resells services to form its own network."[33]

D. ***Discussion***

15. Pursuant to the Commission's Computer II and Computer III decisions, enhanced services are distinguished from basic service by their functional characteristics. Thus, basic telecommunications service is defined as a virtually naked transmission capacity, offered by a common carrier, "for the movement of information between two points."[34] Enhanced services, on the other hand, provide something more, described in 47 C.F.R. § 64.702(a), which defines enhanced services pursuant to a three part definition, as:

> [s]ervices, offered over common carrier transmission facilities used in interstate communications, [a] which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; [b] provide the subscriber additional, different, or restructured information; or [c] involve subscriber interaction with stored information . . . .

47 C.F.R. § 64.702. This definition has been used by the Commission, in the past, in ruling that information storage and retrieval services provided by AT&T are, properly considered, enhanced rather than basic services.[35]

16. However, as presently configured and tariffed, AT&T Dial-It 900 Information Arrangement service no longer provides for interaction with subscriber information stored in the network. Instead, subscriber information is provided by the subscriber, and AT&T facilities are used merely to provide a transmission path from callers to subscriber-stored information. Thus, the Bureau cannot conclude that AT&T Dial-It 900 Information Arrangement service qualifies as enhanced service pursuant to the third clause of 47 C.F.R. § 64.702(a).

17. Neither is AT&T Dial-It 900 Information Arrangement service properly characterizable as enhanced service pursuant to the first two clauses of the definition. Such service does not "employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information."[36] Nor does the service provide subscribers with "additional, different, or restructured information."[37] For all these reasons, and pursuant to the Commission's decisions in Computer II and Computer III, we conclude that AT&T Dial-It 900 Information Arrangement service is a basic transmission service which AT&T, as a dominant carrier,[38] must continue to offer pursuant to tariff.

18. Based on the record before us, however, we cannot similarly conclude that AT&T Call Count Arrangement service is a basic service. First, we note that the Commission specifically found call counting services to be enhanced services in the Reconsideration Order in Computer II, and ordered that such services be detariffed except for "the transmission component of the service."[39] Although the AT&T call counting service which the Commission declared to be enhanced differed in some details from the present service, the differences in this case do not compel a conclusion that Call Count service, as presently offered, must be considered basic service.

19. In the call counting service considered in the Computer II Reconsideration Order, AT&T provided that a caller accessing a 900 number assigned to a sponsor/subscriber would hear a subscriber-recorded message, transmitted from within the network, announcing that the call had been received. In its Dial-It 900 service tariff revision filed subsequent to the Commission's Reconsideration Order, AT&T altered this arrangement so that a network message would be heard.[40] Thus, AT&T and Centel have urged us to conclude that there is no longer any interaction with subscriber information stored in the network and, thus, Call Count service is a basic service.[41]

20. Both AT&T and Centel misunderstand the thrust of the Commission's analysis. The conclusion that Call Count service is an enhanced service follows from a functional consideration of what the service provides. A Call Count service sponsor/subscriber does not seek a transmission path from AT&T in order to provide, *e.g.*, an information service to his customers. Rather, the Call Count sponsor/subscriber obtains that service only in order to obtain substantive information from AT&T, for example, how many callers have voted "yes" or "no." The provision of such information is not incidental to the provision of basic service by AT&T. Instead, provision of the non-telecommunications information is the essential service provided.

21. Thus, a Call Count subscriber does not obtain transmission service in order to facilitate his own enhanced service, but, rather, obtains "additional, different, or restructured information." 47 C.F.R. § 64.702(a). Our review of this service leads us to conclude that AT&T provides the basic service (*i.e.*, the transmission facility), in effect, to itself in order to provide an information service to the Call Count sponsor/subscriber. Such an information service is clearly an enhanced service and, as a result, may not be tariffed and offered as basic service by AT&T absent waiver of the Commission's Rules.[42] Further, AT&T must offer Call Count service in conformity with the non-structural safeguards developed by the Commission in Computer III.[43]

II. *Billing and Collection Issues*

A. *Background and Comments of the Parties*

22. As noted above, Bureau concern about AT&T billing and collection services offered in connection with Dial-It 900 service was triggered by the Wildmon letter[44] and the Ondulich complaint.[45] Specifically, the latter alleged that AT&T was offering two functionally identical Dial-It 900 services, one pursuant to tariff and one pursuant to contract.[46] Consequently, questions concerning AT&T billing and collection services offered in conjunction with Dial-It 900 services were included in the Bureau's February 26, 1988 letter of inquiry to AT&T. In summary, the letter asked AT&T to 1) explain the legal and factual basis for treatment of billing and collection services as non-tariffed services; 2) explain how billing information is or could be provided to billing and collection service competitors and describe the state of competition for such services; 3) submit a current copy of the billing and collection contract; 4) explain how the AT&T Dial-It 900 services tariff and the billing and collection services contract inter-relate including, *inter alia*, how the tariff's limitations of liability provisions could present a defense to complaint allegations concerning the billing and collection arrangement; and 5) discuss whether the telephone service of billing and collection customers is disconnected for failure to pay AT&T-billed sponsor/subscriber charges.[47]

1. *AT & T Comments*

23. In its reply to the Bureau's inquiry, AT&T argues that billing and collection service associated with Dial-It 900 service, known as "Premium Billing", is not a communications service and, as such, is separate and distinct from Dial-It 900 service offered pursuant to tariff. Specifically, AT&T argues that Premium Billing is a third party billing and collection service, offered to enhanced service providers who subscribe to Dial-It 900 service, by which AT&T, as the sponsor/subscriber's agent, collects sponsor/subscriber charges from the sponsor/subscriber's customers[48] and is separate and apart from Dial-It 900 services tariff charges assessed against the sponsor/subscriber by AT&T.

24. Given the foregoing, AT&T asserts it was proper for it to offer Premium Billing pursuant to contract in light of the Commission's 1986 decision to detariff LEC-provided billing and collection services offered to IXCs,[49] and the Commission's 1987 declaration that billing services provided by AT&T to third party shared Enhanced Private Switched Communications Service (EPSCS) users are not Title II communications services and, consequently, may not be tariffed.[50]

25. Explaining the relationship between its non-tariffed Premium Billing service and tariffed Dial-It 900 services, AT&T relates that Premium Billing is provided only to Dial-It 900 service sponsor/subscribers who subscribe to the tariff's so-called Sponsor Paid option whereby they become responsible for all tariffed charges associated with callers' use of the service.[51] Thus, the sponsor/subscriber is responsible for paying tariffed charges for all calls regardless whether AT&T is successful in collecting Premium Billing charges on behalf of the sponsor/subscriber.[52] Moreover, according to AT&T, its Premium Billing contract states that it covers sponsor/subscriber charges only, and that AT&T "has no right, title or interest in the sponsor charges which it collects for and remits to sponsors."[53] AT&T asserts that sponsor/subscribers are not required to take Premium Billing as a concomitant to tariffed Dial-It 900 services and, indeed, tariffed service subscribers are not "entitled" to receive Premium Billing service.[54] Instead, they are separate services, Dial-It 900 services assessed against sponsor/subscribers pursuant to tariff and Premium Billing performed by AT&T as a non-tariffed non-communications service whereby AT&T bills and collects the sponsor/subscriber's charges to callers for the sponsor/subscriber's service.

26. AT&T also declares that Premium Billing cannot and does not alter the rates, terms or conditions of Dial-It 900 services in any way. Conversely, according to AT&T, the Dial-It 900 services tariff's limitations of liability provisions were never asserted as a defense to a claim for damages under the Premium Billing contract, *e.g.*, in the Ondulich complaint. Rather, AT&T denied liability under the contract, in that case, "on the ground that AT&T's obligations under the Premium Billing contract were to bill sponsor charges for all completed calls, and that these obligations were fulfilled."[55] Thus, the tariff defense was raised only as per AT&T's tariff obligations and AT&T's alleged failure to provide for the proper assignment of 900 numbers and for the completion of 900 service calls.[56]

27. AT&T claims that its Premium Billing contract in no way alters minimum call/call minute requirements which are imposed, by tariff, on all Dial-It 900 service sponser/subscribers.[57] According to AT&T, if sponsor/subscribers fail to meet the tariff's minimum call/call minute requirements they are charged a penalty "whether or not they have also contracted for Premium Billing, and regardless of the terms of the Premium Billing contract."[58]

28. As for possible competition in the provision of billing and collection services associated with Dial-it 900 service, AT&T argues that such services are analogous to the billing and collection services offered by LECs and other IXCs. Thus, in Premium Billing, the recording, for billing purposes, of calls is performed by the LECs who also perform billing and collection of sponsor/subscriber charges as agents for AT&T.[59] AT&T notes that the call detail record made available to AT&T contains calling numbers, destination and call duration information, but not the caller's name and address. A third party wishing to provide billing and collection services would require the LECs' name and address data bases to match calls to callers. AT&T notes that the Commission has required LECs to make call detail information available "on a reasonable basis."[60] AT&T argues that the fact of competition for billing of IXC services in general indicates the presence of market forces sufficient to respond to excessive rates or practices by 900 service billing and collection providers.[61]

29. Finally, AT&T states that the local telephone service of callers who do not pay assessed Premium charges is not disconnected because such premium charge payments are not tariffed charges. AT&T repeats that Premium Billing is provided only to Dial-It 900 service subscribers who elect the Sponsor Paid service option. Therefore, Dial-It 900 service subscribers alone are responsible for tariffed charge payments and AT&T reserves the right to discontinue a sponsor/subscriber's 900 service if the sponsor/subscriber fails to make payments.[62] AT&T states that it is "working with all [LECs] performing billing on AT&T's behalf" to ensure that non-payment of sponsor charges, pursuant to Premium Billing, "does not inadvertently result in customer [i.e., caller] disconnection."[63]

2. Comments of Other Parties

30. Centel supports AT&T's conclusion that its Premium Billing service should be offered competitively since it is a non-communications offering.[64] Centel notes that it currently provides "similar services" to IXCs on a non-tariffed basis and opines that a contrary conclusion by the Bureau "would create additional administrative burdens and delays for a similar service were it to be provided to 900 service subscribers".[65]

31. Commenter Paul Ondulich asserts that AT&T has mischaracterized the nature of his informal complaint and, in the process, mischaracterized the closely interrelated nature of Dial-It 900 service and Premium Billing.[66] Ondulich states that his alleged damages derive from a breach in AT&T's performance *per se*, *i.e.*, under both the tariffed and the Premium Billing contract, since these are interrelated. [67] Indeed, Ondulich urges us to understand that a "direct relationship exists" between the Premium Billing contract and tariffed 900 service when a sponsor/subscriber elects to take Premium Billing. Further, both the sponsor/subscriber and the caller "see the service and the billing of the service as one single transmission service".[68] Ondulich also charges that AT&T is improperly "ambiguous" in responding to the Bureau's inquiry about disconnection of caller telephone service for failure to pay Premium Billing charges. Ondulich alleges that he has had conversations with Bell of Pennsylvania employees who assured him that disconnection by Bell of Pennsylvania would take place in such a case, and that Bell of Pennsylvania has received no instructions from AT&T about contrary procedures.[69] Ondulich observes that the Commission has a responsibility to protect both sponsors and callers (consumers) and that only tariff regulation of both 900 service and associated billing and collection services will guarantee that consumers will be protected.[70]

B. ***Discussion***

32. Pursuant to tariff, AT&T provides Dial-It 900 services to sponsor/subscribers and bills such sponsor/subscribers for tariff charges. Where sponsor/subscribers elect the Sponsor Paid option, all costs associated with callers' access to the service are paid by the sponsor/subscriber. Sponsor/subscribers who elect this Sponsor Paid option may also apply for Premium Billing which AT&T offers pursuant to contract. Premium Billing charges are charges which the sponsor/subscriber assesses callers for use of his service. Such charges do not include common carrier communications service charges. AT&T bills callers for these Premium charges on behalf of the sponsor/subscriber. Thus, when a Dial-It 900 service sponsor/subscriber also obtains Premium Billing service from AT&T, callers do not pay any tariffed communications charges but, rather, only those sponsor/subscriber charges which are the subject of the Premium Billing contract. Pursuant to that contract, AT&T collects Premium charges from callers and remits these charges to sponsor/subscribers, in the process "netting out" tariffed charges owed by the sponsor/subscriber and the charge which AT&T assesses for performance of Premium Billing.

33. The clear thrust of the Commission's Billing and Collection Order is that carrier billing and collection services should not be tariffed if such billing and collection is not an interstate common carrier communications service subject to Title II of the Act, and the provision of such services is subject to competition or the likelihood of competition.[71] In the Billing and Collection Order, the Commission investigated third party billing and collection by LECs on behalf of IXCs and determined that such billing and collection activities were not, properly speaking, Title II activities because the LEC was not billing for its own telecommunications service, but rather, on behalf of another carrier, *ie*, the IXC.[72] In such a case, the Commission concluded that there should be no requirement, pursuant to Title II of the Act, 47 U.S.C. §§ 201-224, for tariffing such third party billing and collection services.[73]

34. This having been decided, the Commission went on to inquire whether there was compelling reason to regulate billing and collection services pursuant to the ancillary jurisdiction provision of Title I of the Act, 47 U.S.C. §§ 152(a), 153(a) and 154(i). In this case, the Commission's analysis turned on the presence, or absence, of competition in the provision of untariffed billing and collection services. Following its investigation, the Commission concluded that competitive provision of IXC billing and collection services was both possible and a developing reality. Thus, the Commission noted that credit card companies, among others, were beginning to provide such services.[74] Given the promise and fact of competition, the Commission concluded that tariff regulation was unnecessary to control anticompetitive behavior by third party billing and collection service providers. Therefore, the Commission ordered the LECs to detariff billing and collection service provided to third parties.

35. The Commission reaffirmed its analysis of third party billing and collection services in the shared EPSCS Order.[75] This time, the Commission investigated an AT&T third party billing and collection service and again concluded that the service should be detariffed:

> The service that AT&T provides on an off-tariff basis is analogous to billing services that some carriers provide for other carriers. The Commission has recently determined that such carrier billing services must be detariffed because such a third party billing service is not a communication services for purposes of Title II of the Communications Act. The same reasoning would appear to preclude AT&T from tariffing the billing and other managerial services that it performs for the shared user organization.[76]

36. An examination of the record before us, including AT&T's submitted Premium Billing contract, discloses that AT&T provision of Premium Billing similarly is directed to third parties (ie., callers) on behalf of sponsors for sponsor charges only, *i. e.*, it does not include billing for tariffed charges. As a result, we confirm that Premium Billing charges are not charges for Title II communications services and, pursuant to the Commission's Billing and Collection Order and the Shared EPSCS Order, we conclude that Premium Billing should not be provided pursuant to tariff.

37. Neither do we conclude, at this time, that such services should be regulated pursuant to Title I of the Act. We agree with AT&T and Centel that competitive billing and collection services associated with Dial-It 900 service are forseeable and that regulation on our part may provide disincentives to competitive billing and collection providers. Further, a competitive market for Dial-It 900 services is beginning to emerge with various carriers providing such services at least on a regional basis. Finally, and pursuant to our examination of AT&T's submitted Premium Billing contract, we are convinced that AT&T has taken appropriate steps to distinguish its tariffed 900 service from Premium Billing service. We are not convinced that any connection between the two is so significant as to cause us to abandon our general conclusion, which is that charges billed pursuant to the Premium Billing arrangement are separate and apart from those tariffed communications charges billed to sponsor/subscribers by AT&T, and that Premium Billing charges are not charges for common carrier communications services.

38. For all these reasons, we find that AT&T Premium Billing arrangements should continue to be provided on a non-tariffed basis. However, we shall monitor the development of a competitive market for such services and will revisit this decision if circumstances so warrant. We remain concerned by Mr. Ondulich's allegations concerning the actual provision of Premium Billing services. We expect AT&T to instruct marketing personnel to make known the distinction between tariffed 900 service and non-tariffed Premium Billing service to subscribers who take both. In any event, this problem will only arise in connection with AT&T Dial-It 900 Information Arrangements since we today order AT&T to detariff Call Count Arrangements. Further, we instruct AT&T to take adequate steps to ensure that communications services to callers are not disconnected for failure to pay Premium Billing charges. Specifically, AT&T must ensure that Premium Billing charges are properly identified as such and that appropriate means, such as recording such charges on separate pages from those used to bill for tariffed communications services, are used to clarify the distinction between Premium Billing charges and charges for tariffed communications services. We direct AT&T to re-

port, in writing, to the Enforcement Division within 45 days of the release of this Order, detailing the steps taken to prevent improper disconnection of communications services.

III. CONCLUSION

39. For the reasons set out herein, we find that AT&T Dial-It 900 Information Arrangement service provides sponsor/subscribers with transmission service and, thus, is properly characterizable as basic service pursuant to that definition provided by the Commission in its Computer II and Computer III decisions. We find that AT&T Dial-It Call Count service falls within the definition of enhanced services set out in 47 C.F.R. § 64.702(a) and, as a result, must be offered on a non-tariffed, competitive basis pursuant to the non-structural safeguards developed by the Commission in Computer III. Finally, we conclude that AT&T Premium Billing service, offered to Sponsor Paid option subscribers of AT&T Dial-It 900 service, is not a Title II common carrier service, is subject to current and forseeable competition and, as a result, is properly offered by AT&T on a non-tariffed basis.

ORDERING CLAUSES

40. Accordingly, IT IS ORDERED, pursuant to the authority delegated in 47 C.F.R. § 0.291, that AT&T shall, within 45 days of the release of this Memorandum Opinion and Order, file revisions to its Tariff F.C.C. No. 1 so as to remove therefrom Dial-It 900 Call Count service.

41. IT IS FURTHER ORDERED, pursuant to the authority delegated in 47 C.F.R. § 0.291, that AT&T shall, within 45 days of the release of this Memorandum Opinion and Order, submit a report, in writing, to the Acting Chief, Enforcement Division, detailing the steps it has taken to prevent improper disconnection of communication services to callers who refuse, or otherwise fail, to pay any or all charges due and owing pursuant to AT&T's Premium Billing contract.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] According to AT&T, Dial-It 900 service "is a telecommunications service which permits simultaneous calling by a large number of callers to a single telephone number utilizing the telecommunications network." Tariff F.C.C. No. 1, Section 5.1.1.

[2] *See, e.g.*, Letter of Honorable Trent Lott (R-Miss), to Dennis Patrick, Chairman, FCC, File No. IC-88-02374 (Jan. 25, 1988).

[3] On October 23, 1987, the Commission's General Counsel received a letter from Allen F. Wildmon, Associate Director of the National Federation for Decency, which asked whether billing and collection services offered in connection with AT&T's 900 Dial-It services are common carrier offerings. Also, an informal complaint was filed with the Commission by complainant Paul Ondulich which stated that he had obtained 900 Dial-It service and associated billing and collection services, known as Premium Billing, from AT&T in order to conduct a nationwide poll. The complaint claimed damages for revenues allegedly lost, *inter alia*, because promised 900 numbers were not placed in operation by AT&T on a timely basis. File No. IC-88-00480. Responding to the Ondulich complaint, AT&T asserted as a defense the limitations on liability provisions in its 900 Dial-It service tariff while continuing to maintain that associated billing and collection services were properly provided to complainant on a non-tariffed, contractual basis. Letter of Michael J. Kmetz, District Manager, AT&T, to Anita J. Thomas, Informal Complaints and Public Inquiries Branch, Enforcement Division (Nov. 24, 1987).

[4] Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III), CC Docket No. 85-229, Report and Order, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Recon. Order*), *aff'd on recon.*, 3 FCC Rcd 1135 (1988), *petition for review pending sub nom.*, California v. FCC, Case No. 87-7230, (9th Cir. filed May 28, 1987); *See also*, *Third Computer Inquiry*, Report and Order (Phase II Order) 2 FCC Rcd 3072 (1987), *modified on recon.*, 3 FCC Rcd 1150 (1988), *petitions for review sub nom.*, BellSouth v. FCC, Case No. 88-7290, (9th Cir. filed April 20, 1988; Illinois Bell Telephone Company v. FCC, Case No. 88-1364, (D.C. Cir. filed May 16, 1988).

[5] *See, In the Matter of Amendment of Section 64. 702 of the Commission's Rules and Regulations* (Computer II) 77 FCC 2d 384 (1980), *Recon.*, 84 FCC 2d 50 (1981), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[6] *Computer II Reconsideration*, 84 FCC 2d 50, 53.

[7] *Computer II Reconsideration*, 84 FCC 2d 50, 54-55; 77 FCC 2d 384, 419-421. The Commission's definition of enhanced services, developed in Computer II, is codified in 47 C.F.R. § 64.702(a).

[8] *Computer II Reconsideration*, 84 FCC 2d 50, 53-55.

[9] *Id.*, 56. As an example of such network control features, the Commission identified "choke" techniques built into the network in order to block excessive calls and to avoid congestion and interference with non-Dial-It 900 Service traffic. *Id.*

[10] *Id.*

[11] *See*, AT&T Tariff No. 263, Transmittal No. 14085 (1982).

[12] Letter from Gary M. Epstein, Chief, Common Carrier Bureau to W.E. Albert, Administrator, Rates and Tariffs, AT&T Long Lines (Oct. 21, 1982).

[13] *Id.*

[14] *Id.*

[15] *See*, Letter of Gerald Brock, Chief, Common Carrier Bureau, to Daniel Culkin, AT&T (Feb. 26, 1988) (AT&T Inquiry).

[16] *Id.*

[17] Public Notice, DA 88-420 (released April 4, 1988).

[18] Central Telephone Company (Centel), Telesphere International, Inc. (Telesphere) and Paul J. Ondulich (Ondulich).

[19] AT&T response, 18-19.

[20] *Id.*, 19. When AT&T anticipates that a sponsor's program will exceed available network capacity, the sponsor's program can be routed to 12 additional "mini-nodes" increasing overall network capacity to 17,920 calls. *Id.*, n.2.

[21] *Id.*

[22] *Id.*, 19-20.

[23] *Id.*, 20. The message acknowledging the call states "Thank you for calling [AT&T's] DIAL-IT 900 Service. Your call has been completed and registered." According to AT&T, this mes-

sage is necessary "so that callers will know that calls have been completed, and to prevent callers from re-dialing in the mistaken belief that calls did not get through." *Id.*, 21.

[24] *Id.*, 21, *and citing* Computer III, 50 Fed. Reg. 33581, 33593 (August 20, 1985); Computer II, 77 FCC 2d 384, 421 (1980).

[25] *Id.*

[26] *Id.*, 21-22.

[27] *Id.*, 22.

[28] Commenter Paul Ondulich did not address this issue, *per se*, but insisted that AT&T should not be allowed to plead the limitations of liability language in its tariff as a defense to a failure to provide services ordered. According to Mr. Ondulich, such a failure properly constitutes "a grossly negligent act" which cannot be excused pursuant to the tariff's limitations on liability section. Ondulich Comments, File No. ENF-88-05 (May 6, 1988), p. 5.

[29] Comments of Central Telephone Company (Centel), File No. ENF-88-05, (May 5, 1988), p. 3.

[30] *Id.*

[31] Comments of Telesphere International, Inc. (Telesphere), File No. ENF-88-05 (April 29, 1988), p. 2.

[32] *Id.*

[33] *Id.* Paul Ondulich provided no comments regarding whether such services are basic or enhanced.

[34] *Computer II Reconsideration*, 84 FCC 2d 50, 53.

[35] Specifically, the Commission previously has concluded that mass announcement Dial-It services provided by AT&T were enhanced services where subscriber information is stored in the network for purposes of caller interaction. *Computer II Reconsideration*, 84 FCC 2d 53-55.

[36] 47 C.F.R. § 64.702(a).

[37] *Id.*

[38] *See* Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services (CC Docket No. 79-252), First Report and Order, 85 FCC 2d 1 (1980).

[39] *Computer II Reconsideration*, 84 FCC 2d at 55-56.

[40] *See* n.25, *supra*.

[41] *See* pp. 6-7, *supra*.

[42] Our decision that AT&T may not render Call Count service pursuant to tariff renders moot consideration of whether AT&T may properly offer promotional compensation, pursuant to tariff, for such service. *See* AT&T Inquiry, p. 4, question no. 2. (AT&T has removed promotional compensation provisions from its tariff offering of Information Arrangement service. *See* AT&T Reply, p. 5.)

[43] *Phase I Order*, 104 FCC 2d 958; *Phase I Recon. Order*, 2 FCC Rcd 3035. *Inter alia*, Computer III allows certain dominant carriers, including AT&T, to provide enhanced services on an unseparated basis so long as such carriers file plans disclosing appropriate provision of interconnection to enhanced service competitors and appropriate cost allocation, and that they will provide network information and customer proprietary network information pursuant to mandated disclosure requirements. *Id.*

[44] *Supra*, n.2.

[45] *Id.*

[46] AT&T Inquiry, 1-2.

[47] *Id.*

[48] AT&T Reply, 1-3. AT&T stipulates that actual billing and collection for subscriber charges to callers is undertaken by LECs who also bill sponsor/subscribers pursuant Dial-It 900 services tariff charges owed to AT&T. *Id.*, 7-8.

[49] *In the Matter of Detariffing of Billing and Collection Services*, 102 FCC 2d 1150 (1986) (Billing and Collection Order).

[50] *In the Matter of American Telephone and Telegraph Co., Arrangement for Sharing of EPSCS*, Memorandum Opinion and Order, 2 FCC Rcd 46 (1986) (Shared EPSCS Order).

[51] AT&T Reply, 11 and citing Tariff F.C.C. No. 1, section 5.1.2.E.

[52] *Id.*, 12. Under AT&T's Dial-It 900 services tariff, sponsor/subscribers are always liable for certain tariffed charges, e.g., installation and discontinuance fees. However, sponsor/subscribers may elect various options for billing and collection of postalized caller charges. Under the full Sponsor Paid option, the sponsor/subscriber pays all such charges. Under the Caller Option, callers are billed tariffed charges by AT&T. Under the third option, the sponsor/subscriber and the caller each pay part of the caller charge. *See* Tariff F.C.C. No. 1 §§ 5.1.2.E *et seq*.

Only sponsor/subscribers who elect the Sponsor Paid option, *i.e.*, where the sponsor/subscriber assumes the obligation to pay all tariffed charges, including caller charges, may apply for Premium Billing. Premium Billing charges are not tariff charges, rather, they are charges assessed by the sponsor/subscriber against callers for caller use of the information service provided by the sponsor/subscriber. AT&T, pursuant to the Premium Billing Contract, bills callers for such charges and remits them to the sponsor/subscriber.

[53] *Id.*, and *see* Attachment C, "Agreement for Billing by AT&T of Charges for Vendor Products or Services" (Premium Billing Contract), §§ 5.1 and 5.2.

[54] AT&T Reply, 13 and n.2.

[55] *Id.*, 15.

[56] *Id.*

[57] *Id.*, 16, and citing Tariff FCC No. 1, Section 5.1.3.B.4. A 2,000 call/call minute minimum is imposed on Information Arrangement sponsor/subscribers and a 500 call minimum is imposed on Call Count sponsor/subscribers.

[58] *Id.*, 17.

[59] *Id.*, 7-8.

[60] *Id.*, 9 *and citing* Billing and Collection Order, 102 FCC 2d 1150, 1171, n.53.

[61] *Id.*, 10.

[62] *Id.*, 22-23.

[63] *Id.*

[64] Centel, 3-4.

[65] *Id.*

[66] Ondulich, 3-6.

[67] *Id.*, 4-5.

[68] *Id.*, 6, and Attachment A thereto.

[69] *Id.*

[70] *Id.*, 6-7. Telesphere provided no comments regarding regulation of third party billing and collection services.

[71] 102 FCC 2d 1150 (1986).

[72] 102 FCC 2d 1168-1169. The Commission affirmed that LEC billing and collection for its own communications services must be tariffed. *Id.*, 1168.

[73] *Id.*

[74] *Id.* As AT&T correctly noted, the Commission specifically mandated LEC provision of calling information to facilitate provision of billing and collection by competitive entities. 102 FCC 2d 1171, n.53.

[75] *Shared EPSCS Order, supra*.

[76] *Id.* para. 24.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Boston Gas Company Boston, Southbridge, Leominster Massachusetts	File Nos. 746912 746913 746914
For a waiver of the Rules to allow mobile simplex operation on a paired Multiple Address System frequency, on a primary basis	File No. MWPD-84

WAIVER

Adopted: April 5, 1989; **Released: April 12, 1989**

By the Chief, Land Mobile and Microwave Division:

1. Boston Gas Company (Boston) seeks a waiver of Sections 94.15, 94.63, and 94.65 of the Commission's Rules, 47 C.F.R. §§ 94.15, 94.63, and 94.65, to permit single frequency, one way operation in the 952 MHz band, which is reserved for paired-frequency duplex operation. Boston seeks authority to operate a one-way mobile meter reading Multiple Address System (MAS) on a paired frequency normally reserved for duplex operation pursuant to Sections 94.15(e) and 94.65(a)(1)(ii). Section 94.63(d)(5) permits mobile operations in the 952 MHz band on a case by case basis upon a showing that the applicant's mobile requirements cannot be met on existing mobile allocations and upon a showing of no interference to fixed systems. When permitted under Section 94.63(d)(5), however, mobile operations are normally granted on a secondary basis to fixed operations, whereas Boston has applied for primary authority co-equal with fixed stations.

2. Boston requests authority to operate a mobile meter reading MAS system within areas of 30-mile radius in Boston and 15-mile radius of Southbridge and Leominster, Massachusetts. The proposed system would comprise mobile MAS master stations, which would be installed in medium sized vehicles and operated in areas where customer utility meters would be equipped with a low power Part 15, 47 C.F.R. Part 15, remote unit. The mobile masters would interrogate each remote automatically to obtain readings of natural gas consumption, with interrogation and response occurring in half-duplex fashion. Boston states that it has demonstrated the economic and technical viability of the proposed system by the successful operation of a small experimental prototype, as authorized under experimental station KA2XMJ.

3. Boston certifies in support of its request that, as demonstrated by the frequency engineering analysis it provided, the frequencies in the 956 MHz and 959/928 MHz bands, reserved for simplex operation and available for operation of mobile masters on a primary basis, are not available. Boston pleads, therefore, that it is requesting operation in the 952 MHz band since it is the only remaining MAS spectrum, in the proposed service area, available to accommodate Boston's automated mobile meter reading requirements. Boston pleads further that its engineering analysis indicates that the proposed system would not cause harmful interference to any existing or applied-for systems since the proposed system would not be co-channel to any other existing or proposed systems with a service area within 70 miles of Boston's proposed service area.

4. Boston states in support of its request for primary authority for the mobile masters, that its proposed operation would involve several thousand remote units, with possible expansion to include 500,000 remotes. Boston indicates that, given the magnitude of the planned capital investment necessary for implementing the proposed system, it has serious reservations about installing the system without the interference protection afforded by primary status.

5. The Commission stated, in its *Report and Order* in PR Docket No. 87-5,[1] that mobile meter reading technology can be a valuable use of the spectrum. The Commission noted that mobile meter reading has the potential to benefit consumers by reducing billing problems, increasing the accuracy of meter readings and, ultimately, lowering utility bills. The Commission, moreover, recognized that utility companies cannot be expected to put forth the capital investment necessary to make mobile meter reading succeed, if such systems can only be licensed on a secondary basis.[2] The Commission, therefore, afforded mobile meter reading operations primary status on unpaired frequencies, and provided that in areas where sufficient unpaired spectrum is unavailable, the Private Radio Bureau would consider waivers of the Rules to allow mobile meter reading on the 952 MHz side of a 952/928 frequency pair, on a primary basis. [3]

6. Sections 94.15(e), 94.63(d)(5), and 94.65(a)(1)(ii) were adopted to dedicate, and thereby conserve, separate spectrum for single-frequency and paired-frequency MAS operations, and to minimize the potential for interference in connection with mobile MAS operations. Inasmuch as Boston has demonstrated that there are no alternatives within the Rules, and that no harmful interference would result from its proposed mobile meter reading MAS system, the proposed system would not violate the intent of these Rules.

7. Boston has shown a unique need in this case and appears to have no other alternative within the Rules since, without a waiver, Boston will not be able to operate its automated mobile meter reading MAS system. The proposed operation, moreover, contemplated by the Commission in the *Report and Order*, would not undermine the purposes of the Rules, which are to maintain the integrity of single-frequency and paired-frequency MAS spectrum, and to minimize the potential for interference from mobile operations. We find, therefore, the operation proposed to be in the public interest. *Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

8. Accordingly, pursuant to Section 0.331, 47 C.F.R. § 0.331, and Section 1.3, 47 C.F.R. § 1.3, Boston Gas Company's request for waiver of Sections 94.15, 94.63, and 94.65 for the referenced applications IS GRANTED for an indefinite term.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and
Microwave Division

FOOTNOTES

[1] *See Report and Order* in PR Docket No. 87-5, 3 FCC Rcd 1564 (1988).

[2] *Id.* at ¶ 38.

[3] *Id.* at ¶ 39.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Request for Waiver of

Bank of America, NT & SA MW-59
1455 Market St., 10TH FL.,
#3436
San Francisco, CA 94103

For a Waiver of the Rules to Allow
Use of a One-Way Multiple Address
System Master Station on a Frequency
Assigned for Remote Station Operation

ORDER

Adopted: April 5, 1989; Released: April 12, 1989

By the Chief, Land Mobile and Microwave Division:

I. INTRODUCTION

1. On May 26, 1988, the Bank of America National Trust and Savings Association (Bank), filed a request for waiver of Section 94.65(a)(1) of the Commission's Rules, 47 C.F.R. § 94.65(a)(1). The waiver request relates to the Bank's license application (File No. 747299) for authority to operate a master station of a one-way multiple address system (MAS) on the frequency 928.2875 MHz in the San Francisco area. Under the provisions of Section 94.65(a)(1), 928.2875 MHz comprises part of a frequency pair assigned for two-way MAS stations rather than the one-way mode of operation proposed by the Bank. This frequency, moreover, is for remote operation as opposed to the master station use proposed by the petitioner. Thus, a grant of the Bank's MAS application requires a waiver of Section 94.65(a). For the reasons discussed below, we are granting the instant waiver request.

II. BACKGROUND

2. The Bank of America National Savings and Trust Association is the third largest financial institution in the United States with headquarters in San Francisco, California. The Bank's operations consist of over 800 branches and 1,400 automatic teller machines throughout California. On January 7, 1988, the Bank obtained a license for a paging system in the Business Radio Service located in the San Francisco Basin area under call sign WNJI 697. This system employs 13 transmitter sites to achieve coverage over a 70 mile radius. The paging system is used to support the Bank's Data Processing and security operations as well as its automated teller machines and other customer related activities.

3. The Bank has applied for an MAS station on the frequency 928.2875 MHz in the Private Operational Fixed Microwave Radio Service for the purpose of establishing an omni-directional up-link to control its 13 paging transmitters in the San Francisco vicinity. This multiple address up-link station will consist of one-way transmissions from a master station to control the Bank's paging transmitter sites for the purpose of achieving a simulcast paging system that will minimize the potential for interference.

4. In support of its waiver request, the Bank states that it selected 928.2875 MHz because there are no other MAS frequencies available in the San Francisco area. In this regard, the Bank has furnished an engineering analysis that indicates that all one-way 956 MHz MAS channels as well as all two-way 952 MHz master station channels paired with the corresponding 928 MHz remote channels are exhausted in its proposed area of operation. The remote frequency 928.2875 MHz is available, however, because of 100 kHz channel bandwidth authorizations to two licensees on 952.3 MHz.[1] These non-conforming authorizations were grandfathered on this frequency because these stations pre-dated the Commission's 1982 allocation of MAS channels.[2]

III. DISCUSSION

5. A multiple address radio system is a point-to-multipoint microwave communications system that consists of a fixed master station that receives and/or transmits to and from multiple fixed remote stations. [3] In 1982, the Commission allocated fourteen frequency pairs in the 928/952 MHz bands and eight unpaired frequencies in the 956 MHz band for MAS operations by Private Radio Service eligibles under Part 94 of the Commission's Rules.[4] Under this allocation, as specified in Section 94.65(a) of the Rules, master stations transmit on the 952 MHz side of a particular frequency pair and remote stations transmit on the 928 MHz side of the pair. This system design constitutes "two-way" MAS operation. MAS stations in a one-way simplex mode, such as the Bank's proposed station, are normally authorized to operate on the unpaired 956 MHz frequencies.

6. In considering waiver requests, we must determine if there are any reasonable alternatives within the existing rules.[5] In the instant case, the Bank has adequately shown that there are no available one-way MAS frequencies that can be routinely assigned.

7. In addition, we must determine whether a waiver of the subject rule section would frustrate the public interest policy sought to be protected.[6] The Commission's MAS paired and unpaired frequency allocation policy, for two-way and one-way systems, respectively, is designed to maximize spectrum efficiency. In this regard, unpaired use of a paired channel is normally contrary to the public interest because use of only one channel precludes the use of the frequency pair by others that require two-way capability. The designation of frequencies exclusively for remote or master station operation minimizes the potential for interference. Thus, Section 94.65(a) seeks to maximize spectrum use while minimizing the potential for harmful interference by distinguishing between one-way and two-way stations and master and remote operations.

8. The grandfathered authorizations of 100 kHz bandwidth on 952.3 MHz, however, preclude the use of the requested 928.2875 MHz channel for two-way operation. Thus, the authorization of a one-way MAS station on this frequency in this instance would maximize the use of the spectrum. Similarly, master station operation by the Bank on the 928.2875 MHz remote channel will not

increase interference potential because these wide band stations prevent the Commission's authorization of local co-channel use by other two-way MAS stations. Thus, the wide band stations in the San Francisco area negate the significance of the operational distinctions in Section 94.65(a) of the Rules.

9. Accordingly, pursuant to Rule Sections 0.331 and 1.3, 47 C.F.R. §§ 0.331 and 1.3, IT IS ORDERED that the Bank of America National Trust and Savings Association's request for waiver of Section 94.65(a) of the Rules to allow it to operate a one-way MAS master station on the frequency 928.2875 MHz IS GRANTED for an indefinite term.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and
Microwave Division

FOOTNOTES

[1] These authorizations have been issued to the San Francisco Medical Society for station WEE 278 and the San Mateo Medical Society for station WEE 279. The standard bandwidth for MAS stations had been 25 kHz. The Commission recently reduced this standard to 12.5 kHz. *See* Report and Order, PR Docket No. 87-5, 3 FCC Rcd 1564 (1988).

[2] *See* Second Report and Order, SS Docket No. 79-18, *supra;* and 47 C.F.R. § 94.65(a).

[3] 47 C.F.R. § 94.3.

[4] Second Report and Order, SS Docket No. 79-18, 47 Fed. Reg. 6,869 (February 17, 1982).

[5] *See* WAIT Radio v. Fcc, 418 F.2d 1153, 1157 (D.C. Cir. 1969); and Thomas Radio v. FCC, 716 F.2d 921 (D.C. Cir. 1983).

[6] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-31

In the Matter of

Amendment of Section 73.202(b),	RM-5682
Table of Allotments,	RM-5848
FM Broadcast Stations.	RM-5979
(Moscow, Ohio; Paris, Wilmore,	RM-6166
Morehead, Falmouth, Winchester,	RM-6384
Carrollton, Elizabethtown,	RM-6385
Dry Ridge, Somerset,	
and Williamstown, Kentucky)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 8, 1988; Released: December 13, 1988

By the Deputy Chief, Policy and Rules Division:

1. This proceeding involves a complex daisy chain of FM allotment rule making proposals for the states of Ohio and Kentucky. Our decision in this *Report and Order* makes two new FM allotments, upgrades two station from Class A to Class C2 channels, and makes three channel substitutions designed to facilitate a channel upgrade and to remove short spacings between existing stations. The proceeding began with a *Notice of Proposed Rule Making*, 3 FCC Rcd 654 (1988), issued at the request of Richard L. Plessinger, Sr. (Plessinger). The *Notice* proposed the allotment of Channel 298A to Moscow, Ohio, as that community's first local FM station, and requested that the petitioner submit comments demonstrating Moscow's status as a community for allotment purposes. Plessinger filed two separate pleadings in response to the *Notice*, and Christian R. Caggiano (Caggiano) filed comments stating an intention to apply for the channel, if allotted. LM Communications, Inc. (LM), licensee of station WCOZ(FM), Channel 244A, Paris, Kentucky, and WKDJ, Inc. (WKDJ), licensee of station WFMI(FM), Channel 261, Winchester, Kentucky, each filed comments and a counterproposal. LM filed a supplement to its comments and reply comments. Joseph H. Clasgens II (Clasgens) filed reply comments.[2]

2. The two counterproposals suggest upgrades to existing stations, and request channel substitutions to accommodate those upgrades. In its counterproposal, LM requests the substitution of Channel 245C2 for Channel 244A at Paris, Kentucky, [3] and the modification of its license for WCOZ accordingly.[4] In order to accommodate the channel substitution at Paris, LM requests the substitution of Channel 298A for Channel 245A at Falmouth, Kentucky, the substitution of Channel 221C2 for Channel 242A at Wilmore, Kentucky, and, in order to accommodate the Wilmore substitution, the substitution of Channel 299A for Channel 221A at Morehead, Kentucky. In its counterproposal, WKDJ proposes the substitution of Channel 261C2 for Channel 261A at Winchester, and modification of its license for Station WFMI accordingly. In order to accommodate the channel substitution at Winchester, WKDJ proposes the substitution of Channel 253A for Channel 261A at Elizabethtown, Kentucky, and Channel 237A for Channel 261A at Carrollton, Kentucky. Station WQXE, licensed to Hardin County Broadcasting Co., Inc. (Hardin County), presently operates on Channel 261A at Elizabethtown. Station WIKI, licensed to WIKI, Inc. (WIKI), presently operates on Channel 261A at Carrollton, Kentucky.

3. Both LM's and WKDJ's counterproposals involve another proceeding, MM Docket 86-201. In that proceeding the Commission substituted Channel 245A for Channel 237A at Falmouth, Kentucky, and modified the license of station WIOK accordingly. *See Report and Order*, 2 FCC Rcd 2049 (1987). LM and the licensee of station WIOK filed petitions for reconsideration of the *Report and Order*. Because Channel 245A at Falmouth conflicted with LM's proposed upgrade, LM in this proceeding proposed the substitution of Channel 298A for Channel 245A at Falmouth, or, alternatively, the grant of LM's petition for reconsideration of the *Report and Order*, which would leave Channel 237A in Falmouth. Because Channel 237A at Falmouth conflicts with the substitution of Channel 237A for Channel 261A at Carrollton, Kentucky, a substitution necessary to implement WKDJ's proposed upgrade, WKDJ's proposal, when filed, was contingent on denial of the petitions for reconsideration insofar as they requested leaving station WIOK on Channel 237A. LM's and WKDJ's proposals do not otherwise directly conflict with each other.

4. WKDJ's proposal does not directly conflict with the proposed allotment of Channel 298A to Moscow. However, the proposal does conflict with a separately filed petition for rule making, filed by James Philip Gray (Gray), requesting the allotment as a first local service of Channel 237A to Dry Ridge, Kentucky. Although alternative Channel 293A is available for allotment to Dry Ridge, that channel conflicts with a separate proposal, filed by Ohio Kentucky Radio Company (OK Radio) requesting the allotment as a first local service of Channel 293A to Williamstown, Kentucky. Although Channel 298A would be available at either Williamstown or Dry Ridge, it conflicts with LM's proposal to substitute Channel 298A for Channel 245A at Falmouth, and with the proposed allotment of Channel 298A to Moscow. Accordingly, Gray's and OK Radio's petitions were consolidated in this proceeding.[5]

5. LM's proposal conflicts with a separate petition for rule making filed by First Radio, Inc. (First Radio), licensee of Station WSEK-FM, Somerset, Kentucky. First Radio requests the substitution of Channel 246C2 for Channel 244A at Somerset, and modification of its license accordingly, at the present site of Station WSEK-FM.[6] In its counterproposal, LM requests the imposition of a site restriction on the upgrade at Somerset in order to resolve the conflict.[7] Accordingly, First Radio's petition was consolidated in this proceeding.

6. OK Radio, Gray, First Radio, WKDJ, Dale McMillan (McMillan), Herbert Caldwell (Caldwell),[8] Maycourt Company (Maycourt), licensee of WMGB(FM), Georgetown, Kentucky, Hardin County, Amber Broadcasting Corporation (Amber), licensee of Station WIOK, Falmouth, Kentucky, and WLLT, Inc., licensee of Station

WLLT(FM), Fairfield, Ohio, each filed comments replying to the counterproposals. WKDJ filed a timely supplement to its reply comments. Morehead Broadcasting Company (Morehead), licensee of WMOR-FM, Morehead, Kentucky, filed untimely comments. Gray filed two supplements to his reply comments. OK Radio filed a response to Gray's second supplement. Amber filed a request for withdrawal of rule making. Gray and WIKI filed comments concerning that request, and Amber responded to WIKI's comments. LM filed supplemental comments and a response to WIKI's comments. First Radio filed supplemental comments. Hardin County filed a supplemental pleading withdrawing its opposition to WKDJ's counterproposal. These pleadings, to the extent they are acceptable and relevant, will be discussed below.

Moscow, Ohio

7. In response to the *Notice*'s request for evidence demonstrating indicia of community status for Moscow, Ohio, Plessinger submitted his "First Reply Comments." In those comments, Plessinger states that Moscow has its own post office, that there is a nuclear power plant on the edge of town, that there is a lower grade school in Moscow that is a part of the Clermont County School System, and that, to the best of his knowledge, Moscow has tripled in size. Plessinger provided no substantiation for his claims.[9] No other party submitted information concerning indicia of community status sufficient to justify an allotment to Moscow, and LM submitted information showing a lack of such indicia. Plessinger did not respond to LM's showing. Plessinger's submission is patently insufficient to satisfy the burden imposed by the *Notice*. Accordingly, the proposal to allot channel 298A to Moscow will be dismissed.

Paris, Falmouth, Morehead, and Wilmore, Kentucky

8. LM's counterproposal for an upgrade at Paris, Kentucky, although acceptable for consideration in this proceeding, is not grantable. In order to accommodate the substitution of Channel 245C2 for Channel 244A at Paris, LM proposed the substitution of Channel 221C2 for Channel 242A at Wilmore, Kentucky. Channel 242A was allotted to Wilmore in MM Docket 84-231.[10] In its counterproposal, LM recognizes that Channel 221C2 at Wilmore is short spaced to noncommercial educational station WFPK, Channel 220C1, Louisville, Kentucky.[11] LM submits, however, that because WFPK operates with an effective radiated power of 100 kilowatts at a height above average terrain of 72 meters, its predicted 1 mV/m contour extends only 26.5 miles. LM notes that the predicted distance to the 1 mV/m contour for a Class C2 station operating at maximum power and height is more than 26.5 miles.[12] LM therefore requests that Station WFPK be reclassified as a Class C2 station. In support of its request, LM asserts that Station WFPK would retain ample room to increase its facilities should it be reclassified. LM also submits an affidavit from William Ptacek, Director of the Louisville Free Public Library, the licensee of Station WFPK, in which Mr. Ptacek states his understanding that WFPK's signal extends eight miles less than a signal for a full Class C2 station would, and that the substitution at Wilmore could be made without creating impermissible interference to WFPK's one millivolt per meter contour. Mr. Ptacek states that the licensee of WFPK does not object to treatment of its station as a class C2 facility for purposes of considering LM's proposal.

9. Sections 73.210 and 73.211 of the Commission's rules set forth provisions for the classification of FM broadcast stations. Those rules govern situations where a commercial allotment could potentially conflict with a noncommercial assignment. *See* 47 CFR §§ 73.207(a), 73.507(a). Although those rules allow for class C2 stations with a height above average terrain in excess of the class C2 maximum (150 meters), they do not allow for class C2 stations with an effective radiated power in excess of 50 kilowatts. *Compare* 47 CFR §§ 73.211(a)(3), (b)(2) with § 73.211(b)(1). Accordingly, in the absence of a waiver, we are constrained to classify a station operating with 100 kilowatts effective radiated power, such as WFPK, as at least a class C1 station. Therefore, even if we were to accept as an acquiescence to the downgrading of WFPK Mr. Ptacek's statement that the licensee of WFPK does not object to treatment of its station as a class C2 facility for purposes of this proceeding, we decline to reclassify WFPK.[13]

10. The window period for filing applications for Channel 242A at Wilmore closed on July 28, 1988. Commission policy allows us to now consider the substitution of a Class A Channel for Channel 242A at Wilmore, provided that the substitute channel can be used at the site specified in each of the applications currently on file for the allotment.[14] Our engineering analysis indicates that there are no channels available that would meet the spacing requirements to existing licenses and permits at each of the sites specified in the applications for Channel 242A at Wilmore.[15] Because no substitution at Wilmore is possible, we will not further consider the proposed upgrade at Paris, Kentucky, or the substitutions necessary to accomplish that upgrade.[16]

Somerset, Kentucky

11. Denial of the Paris proposal removes the only conflict between the proposals in this proceeding and the Somerset proposal. Accordingly, we will grant WSEK's request and upgrade the Somerset station to Channel 246C2.[17] Although the Somerset proposal is also short-spaced to seven of the twenty-two applications for Channel 246C2 at Goodlettsville, Tennessee, those applicants will be permitted to amend their applications to meet spacing requirements to the upgrade at Somerset on Channel 246C2.[18] We note that the Somerset proposal was fully spaced to the Goodlettsville allotment when filed, that the Goodlettsville allotment was not made in Docket 84-231, and that the upgrade of WSEK at its existing site would require fewer applicants for the Goodlettsville allotment to amend their applications than the upgrade of WSEK at the alternative site proposed by LM.

Winchester, Carrollton, Elizabethtown, Dry Ridge and Williamstown, Kentucky

12. WKDJ's counterproposal to upgrade station WFMI at Winchester from Channel 261A to Channel 261C2 requires the substitution of Channel 237A for Channel 261A at Carrollton, and the substitution of Channel 253A for Channel 261A at Elizabethtown, Kentucky. A staff engineering analysis confirms that there are no other channels available for substitution at Carrollton and Elizabethtown. When WKDJ filed its counterproposal, the substitution at Carrollton was contingent on the outcome of petitions for reconsideration of our action in Docket 86-201, in which we substituted channel 245A for Channel 237A at Falmouth, Kentucky, and modified the li-

cense for Station WIOK accordingly. Channel 237A is only available at Carrollton if Channel 237A is deleted from Falmouth.

13. Amber, the licensee of Station WIOK, requested after the close of the pleading cycle in this proceeding that WIOK remain on Channel 237A. Amber's predecessor in interest, IOK, Inc. (IOK), was the original proponent of the substitution of Channel 245A for Channel 237A at Falmouth. However, when that substitution was conditioned on the outcome of LM's appeal, IOK petitioned for reconsideration, requesting instead the substitution of Channel 298A at Falmouth. By a separate *Memorandum Opinion and Order* in Docket 86-201, adopted prior to this *Report and Order*, we are vacating our earlier action substituting Channel 245A for Channel 237A at Falmouth. If WIOK remains on Channel 237A, Channel 237A will not be available to substitute for Channel 261A at Carrollton.

14. In a pleading filed in this proceeding, but not in Docket 86-201, WIKI opposes Amber's request to remain on channel 237A, and argues for the substitution of Channel 298A for Channel 237A at Falmouth. WIKI notes that its present station on channel 261A at Carrollton is short-spaced by 4.4 kilometers to Station WDJX, Channel 259B, Louisville, Kentucky, and that the substitution of Channel 237A for Channel 261A would allow it to relocate to a preferable transmitter site.[19] WIKI states its willingness to reimburse Amber for the reasonable and prudent costs incurred in modifying WIOK to operate on Channel 298A.

15. In a responsive pleading, LM states that it has no objection to the substitution of Channel 298A for Channel 237A if its upgrade proposal is adopted prior to or simultaneously with the substitution at Falmouth. However, LM notes that any use of Channel 298A inconsistent with the proposal it advanced in Docket 84-231 for the upgrade of its station WCOZ at Paris must be conditioned on the outcome of its appeal of the Commission action denying its proposal. LM also argues that WIKI has not previously been a proponent of the channel change at Falmouth, and that WIKI's request, because it was advanced after the comment date in this proceeding, is untimely.

16. We believe it appropriate to consider WIKI's request in this proceeding. The proposal to substitute Channel 298A for Channel 237A or Channel 245A at Falmouth was advanced in initial comments in this proceeding by both LM and WKDJ. The public received notice of that proposal. In addition, it was unnecessary for WIKI to advance the proposal prior to Amber's withdrawal of interest because Amber itself was the proponent of the channel substitution. Amber's express consent to the substitution obviated the need for compliance with formal show cause procedures to modify Amber's license. In addition, in a supplemental pleading Amber has stated that it does not oppose WIKI's request that WIOK be moved to Channel 298A, so long as WIKI agrees to reimburse Amber for the reasonable and necessary expenses associated with the change. WIKI has made the necessary commitment to reimburse Amber for expenses incurred in changing channels. The substitution of Channel 237A for Channel 261A at Carrollton could provide public interest benefits by both removing an existing short spacing and allowing the upgrade of WKDJ. Accordingly, we will make the requested substitutions.[20] The substitution of Channel 298A at Falmouth will, as LM has requested, be conditioned on the outcome of its appeal in Docket 84-231. WIKI will also be required to reimburse Amber for the reasonable and necessary costs of the change.

17. The substitution at Carrollton is one of two channel substitutions necessary before WKDJ's upgrade proposal can be granted. The other necessary substitution is Channel 253A for Channel 261A at Elizabethtown. Although Hardin County, the licensee of the Elizabethtown station, originally opposed the substitution, it subsequently withdrew its opposition on the condition that WKDJ be required to reimburse it for the reasonable and necessary expenses incurred in making the change. Hardin County notes that its station WQXE is currently short spaced to Station WDJX, Channel 259B, Louisville, Kentucky.[21] It also notes that the substitution will remove a substantial site restriction on allotted and applied for channel 263C2 at Louisville, Kentucky. WKDJ has made the necessary commitment to reimburse Hardin County. Accordingly, we will substitute Channel 253A for Channel 261A at Elizabethtown, and modify Hardin County's license accordingly, at the licensed site for Station WQXE.[22] We will also substitute Channel 261C2 for Channel 261A at Winchester, and modify WKDJ's license for station WFMI accordingly.[23]

18. The Dry Ridge and Williamstown proposals can be accommodated consistent with WKDJ's proposed upgrade and WIKI's proposed channel substitution. Channel 293A is available for allotment to either community. In addition, because LM's proposed upgrade is not grantable, Channel 245A is available for allotment to either community, conditioned on the outcome of LM's appeal. We discuss the comments in support of and objections to these channels below.

19. In its comments to the counterproposals, WKDJ argues that Williamstown and Dry Ridge should be allotted a single channel on a hyphenated basis. WKDJ notes that hyphenated allotments are a sparingly used Commission allotment tool, but that such allotments are made upon a showing that the communities involved should be considered as one community due to geographical proximity and economic, cultural and social interdependence, and that none of the communities alone could support a station. In support of its request, WKDJ submits evidence showing that Williamstown and Dry Ridge are both small communities, with populations of 2,508 and 1,475 respectively. WKDJ notes that Dry Ridge and Williamstown are separated by approximately six kilometers (4 miles), and that they both receive sheriff, hospital, library and ambulance service from Grant County. WKDJ notes that Williamstown provides water service to Dry Ridge, and electricity to parts of Dry Ridge. Other parts of Dry Ridge are served by Union Light Heat and Power and the Owen County Rural Cooperative. WKDJ also concedes that Williamstown has its own independent school system, while Dry Ridge is served by the Grant County school system, and that Williamstown and Dry Ridge have separate city governments, and do not share a cable system, bank, or fire department. WKDJ submitted no showing that each separate community could not support a station.

20. WKDJ's showing is insufficient to justify a hyphenated allotment. The evidence submitted by WKDJ shows that Williamstown and Dry Ridge are separate and distinct communities, with divergent economic, social, and political interests. Moreover, in the absence of a showing that each community could not support a station, we will not make a hyphenated allotment.

21. In supplemental comments, Gray submits that, while Channel 293A at Williamstown is fully spaced to all entries in the Commission's FM Engineering Data Base, it is in actuality short spaced to Station WDRK, Channel 293B, Greenville, Ohio. In opposition, OK Radio notes that WDRK's license has been revoked, and that Channel 293A at Williamstown is fully spaced to a construction permit, held by City Broadcasting Corp., for a new station on Channel 293B at Greenville. The license renewal application for Station WDRK has been denied, and a competing application granted.[24] Therefore, we will only consider the authorization held by City Broadcasting Corp. for a new station at Greenville.[25] Channel 293A at Williamstown is fully spaced to the Greenville construction permit,[26] and the allotment can be made in compliance with the Commission's rules.

22. Gray also submits that Channel 245A is available to accommodate his interest in an allotment to Dry Ridge. LM opposes that request. LM argues that Gray "lacks standing" to advance a proposal involving channel 245, because Gray did not advance any such proposal by the comment date in this proceeding. LM concludes that Gray's proposal is untimely, and that the only proposed use of Channel 245 that can be considered in this proceeding is LM's proposed upgrade. We reject LM's contention. The Appendix to the *Notice* in this proceeding explicitly placed parties on notice that, in the event counterproposals were filed, the Commission might allot a different channel than was requested for any of the communities involved in the proceeding. Gray's proposal to allot a channel to Dry Ridge was timely. The use of a different channel than that proposed originally by Gray does not make the proposal for Dry Ridge untimely. Accordingly, we will allot Channel 245A to Dry Ridge.[27] However, the allotment will be conditioned on the outcome of LM's appeal, because it conflicts with the proposed upgrade to WCOZ LM seeks to obtain in its appeal.[28]

23. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 27, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

City	Channel No.
Carrollton, Kentucky	237A
Dry Ridge, Kentucky	245A
Elizabethtown, Kentucky	253A
Falmouth, Kentucky	298A
Somerset, Kentucky	246C2, 272A
Williamstown, Kentucky	293A
Winchester, Kentucky	261C2

24. The window period for filing applications for Channel 245A at Dry Ridge and Channel 293A at Williamstown will open on **January 30, 1989** close on **March 1, 1989.**

25. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the-Communications Act of 1934, as amended, the license of First Radio, Inc. for-Station WSEK(FM), Somerset, Kentucky, IS MODIFIED, to specify operation on Channel 246C2 in lieu of Channel 244A, subject to the following conditions:

(a) Within 90 days of the effective date, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

26. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of WKDJ, Inc., for Station WFMI(FM), Winchester, Kentucky, IS MODIFIED, to specify operation on Channel 261C2 in lieu of Channel 261A, subject to the following conditions:

(a) Within 90 days of the effective date, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

27. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Amber Broadcasting Corporation for Station WIOK(FM), Falmouth, Kentucky, IS MODIFIED effective January 27, 1989, to specifiy operation on Channel 298A, in lieu of Channel 237A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in license BLH-7668, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-7668, except for the channel as specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

28. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Report and Order *by Certified Mail, Return Receipt Requested,* to the following:

Bledsoe Communications, Ltd.
2100 W. End Avenue,
Nashville, TN 37203

Masterpeace Music
Suite 900 1622 Shady Circle
Lebanon, TN 37087

Mr. Toni E. Plummer
915 Green Briar Trace
Nashville, TN 37214

DG Enterprises, Inc.
964 McCrory Creek Road
Nashville, TN 37214

William E. Benns, III
1403 Hickman Road
Virginia Beach, VA 23452

Tennessee Women in
Broadcasting, Inc.
3866 Dickerson Road
Nashville, TN 37207

Goodlettsville Associates
7349 Lullwater Road
Columbus, TN 31904

29. IT IS FURTHER ORDERED, That the petition for rule making filed by Richard L. Plessinger, Sr. IS DISMISSED.

30. IT IS FURTHER ORDERED, That the counterproposal filed by LM Communications, Inc., IS DENIED.

31. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

32. For further information concerning this proceeding, contact Karl A. Kensinger, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Paris, Wilmore, Morehead, Falmouth, Winchester, Carrollton, Elizabethtown, Dry Ridge, Somerset and Williamstown, Kentucky, have been added to the caption.

[2] Clasgens' reply comments state his interest in applying for Channel 298A at Moscow. Clasgens' expression of interest is untimely. In addition, the expression of interest was signed by James E. Price, technical consultant to the petitioner, and was not signed or verified by Mr. Clasgens, in contravention of Section 1.52 of the Commission's rules. In addition, Mr. Clasgens' address was not provided. Accordingly, Clasgens' reply comments will not be considered in this proceeding.

[3] LM has also petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Commission's denial of a proposal advanced in MM Docket 84-231 requesting the upgrade of its station WCOZ from Channel 244A to Channel 245C2. The instant proposal differs from that proposal because it suggests different channel substitutions at other communities to accommodate the upgrade. *See James Reeder v. FCC*, Case No. 86-1045 (D.C. Cir., filed January 21, 1986).

[4] The coordinates for Channel 245C2 at Paris are the coordinates for the licensed site of WCOZ, at 38-07-37 and 84-21-09.

[5] Public Notice of the Counterproposals and Gray's and OK Radio's proposals was given on May 26, 1988, Report No. 1731.

[6] The coordinates are 37-07-06 and 84-36-44.

[7] The coordinates of the site restricted allotment are 36-58-52 and 84-39-30.

[8] McMillan's and Caldwell's comments were not served on the parties to the proceeding. The *Notice* stated that filings not complying with the service requirements of the Commission's rules would violate the Commission's *ex parte* rules and would not be considered in this proceeding. Accordingly, McMillan's and Caldwell's comments will not be considered.

[9] The 1988 Edition of the *Rand McNally Commercial Atlas* indicates that Moscow's population has in fact declined, from 348 in 1980 to 324 currently.

[10] The coordinates for the Wilmore allotment are 37-51-48 and 84-39-30.

[11] The coordinates at Station WFPK are 38-14-40 and 85-45-27.

[12] The maximum effective radiated power for a class C2 station is 50 kW, and the maximum height above average terrain 150 meters (492 feet). A class C2 station operating with maximum facilities places a predicted 1 mV/m contour at a distance of 52 kilometers (32.3 miles).

[13] We also note that, even if we were free to reclassify WFPK, channel 221C2 at the Wilmore reference coordinates, 37-51-48 and 84-39-30, would be separated from WFPK, at licensed coordinates 38-14-40 and 85-45-27, by 105.3 kilometers. The Commission's rules, however, require a separation between Class C2 first adjacent channels of 130 kilometers. Therefore, the allotment of Channel 221C2 to Wilmore would require a substantial site restriction. A staff engineering analysis indicates that there is a substantial question as to whether, from the restricted site, a station operating at the reference HAAT for Class C2 stations could provide line of sight service to Wilmore, due to terrain obstructions at a distance of approximately 8 kilometers from Wilmore.

[14] There are currently four applications on file for the Wilmore allotment. File No. 880726MA is at coordinates 37-52-18 and 84-40-08. File No. 880272MM is at coordinates 37-55-47 and 84-33-12. File No. 880728MD is at coordinates 37-56-07 and 84-33-39. File No. 880727NE is at coordinates 37-52-28 and 84-39-30.

[15] We specifically note that Channel 221A at Wilmore is unacceptable as a substitute even if we were to reclassify station WFPK to a Class C2 station. The minimum distance separation requirement between Class A and Class C2 first adjacent stations is 105 kilometers. However, the distance between application 880727NE and WFPK is 103 kilometers.

[16] Morehead's objection to LM's proposal is, accordingly, moot.

[17] The coordinates are the same coordinates as WSEK's licensed transmitter site, at 37-07-06 and 84-36-44.

[18] The applicants are Bledsoe Communications, Ltd. (File No. BPH-861216MD), Masterpeace Music (File No. BPH-861217MD), Mr. Toni E. Plummer (File No. BPH-861217MG), DG Enterprises, Inc. (File No. BPH-861217ML), William E. Benns, III (File No. BPH-861217MQ), Tennessee Women in Broadcasting, Inc. (File No. BPH-861217MT), and Goodlettsville Associates (File No. BPH- 861217NB). These applicants will be served with a copy of this *Report and Order*.

[19] The substitution of Channel 237A for Channel 261A at WIKI's present site, at coordinates 38-39-43 and 85-12-04, would be short spaced by 2.6 kilometers (27 kilometers required) to station WKID, Channel 240A, Vevay, Indiana, at coordinates 38-50-12 and 85-01-48. However, at the site specified in WKDJ's counterproposal, and supported by WIKI, at coordinates 38-38-23

and 85-12-44, Channel 237A is fully spaced to WKID, and to a construction permit held by WKID, at coordinates 38-49-15 and 84-59-35.

[20] Channel 298A at Falmouth meets the Commission's minimum distance separation requirements at WIOK's licensed site, at coordinates 38-43-15 and 84-22-27, and at the site proposed in its application BPH-880303UD, at coordinates 38-35-13 and 84-21-40.

[21] WDJX is licensed at coordinates 38-21-53 and 85-50-18, and is 68.8 kilometers distant from WQXE, whereas 69 kilometers is the distance separation requirement between Class A and B first adjacent channels. Because less than .5 kilometers, the short spacing is not cognizable under the Commission's rules. *See* 47 CFR § 73.207.

[22] The coordinates are 37-44-46 and 85-53-18.

[23] The allotment is site restricted 31.7 kilometers northwest, at coordinates 38-08-00 and 84-29-35. The site restriction is slightly too far from Winchester to presume that a station would provide city grade coverage. However, a site at coordinates 38-08-07 and 84-26-10, some 27.6 kilometers northwest of Winchester, would meet the Commission's spacing requirements to each of the applications on file for Channel 260A at Van Cleve, Kentucky. A staff engineering analysis indicates that there do not appear to be any significant terrain obstructions between each of these sets of coordinates and Winchester.

[24] *See* 86 FCC 2d 896 (1981), *summarily aff'd.*, No. 81-1662, slip op. (D.C. Cir. March 3, 1982).

[25] *See* 47 CFR §§ 73.207, 73.208. In determining compliance with minimum distance separation requirements, the Commission utilizes the coordinates of authorized transmitter sites. For the Channel 293B allotment at Greenville, the authorized transmitter site is the site for the construction permit.

[26] The coordinates for Channel 293A at Williamstown, 38-37-15 and 84-35-45, are at a site 3.5 kilometers (2.2 miles) southwest of the community. The coordinates for Channel 293B at Greenville are 40-08-49 and 84-36-36.

[27] The coordinates at city reference for Channel 245A are 38-40-54 and 84-35-18.

[28] Because any action taken by the Court of Appeals that might require us to delete Channel 245A at Dry Ridge could cause us to consider Channel 298A as an alternative, thereby rendering Channel 298A unavailable to accommodate the upgrade at Winchester and the associated Channel substitutions at Carrollton, Elizabethtown, and Falmouth, we will also condition those changes on the outcome of LM's appeal.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Amendment
of Parts O and 19 of the Commission's
Rules to Establish the Office
of Inspector General and the
Internal Control and Security Office

ORDER

Adopted: March 29, 1989; Released: April 12, 1989

By the Commission:

1. By this action, the Commission amends its rules to reorganize the Internal Review and Security Division within the Office of Managing Director into two distinct organizations: an independent Office of Inspector General reporting directly to the Chairman and the Internal Control and Security Office, which will be under the supervision of the Managing Director.

2. On October 18, 1988, the President signed into law the Inspector General Act Amendments of 1988. Pub. L. No. 100-504, 102 Stat. 2515 (1988). This law amends the Inspector General Act of 1978[1] to require 33 designated federal entities to create an Office of Inspector General (OIG) as they now exist in many Executive Branch departments. Section 104 of the Act defines the Federal Communications Commission as one of the designated federal entities that must establish and maintain an Office of Inspector General not later than 180 days after the enactment of the law.

3. The reasons for the creation of an Office of Inspector General are set out in the Inspector General Acts. First, the OIG will conduct and supervise audits and investigations relating to the programs and operations of the agency. Second, it will provide leadership and coordination and recommend policies for activities designed to promote economy, efficiency and effectiveness, as well as to prevent and detect fraud and abuse in the programs of the agency. Finally, the Office of Inspector General will provide a means for keeping the head of the agency, Commissioners and the Congress fully and currently informed about problems and deficiencies at the agency.[2]

4. The Inspector General is appointed by the Chairman with the approval of the Commissioners and operates under the Chairman's general supervision. However, the Chairman may not prevent nor prohibit the Inspector General from initiating or completing any audit or investigation, or from issuing any subpoena. Should an Inspector General be removed or transferred to another office, the Chairman must communicate the reasons for the action in writing to Congress.[3]

5. This reorganization entails the transfer of all audit and many investigative functions from the Internal Review and Security Division (IRSD) to the new Office of Inspector General. To reflect these modified functions, IRSD will be renamed the Internal Control and Security Office (ICSO), but will continue to report to the Managing Director. The ICSO will continue to coordinate the Commission's Freedom of Information Act program; provide *ex parte* coordination; oversee employee ethics and financial disclosure; operate the personnel clearance and security program; maintain building and document security; and conduct Part 19 employee misconduct investigations in which the Inspector General chooses not to participate. In addition, ICSO will be responsible for the Commission's internal control and vulnerability assessment program.

6. Because these amendments address only matters of internal agency organization and procedure, compliance with the notice and comment procedure of the Administrative Procedure Act is not required. 5 U.S.C. §553 (b)(1)(A). Since a general notice of proposed Rule Making is not required, the Regulatory Flexibility Act, 5 U.S.C. §§603 and 604, does not apply.

7. Accordingly, IT IS HEREBY ORDERED THAT, pursuant to the authority contained in Sections 4(i) and 5(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and 155(b), and Section 104 of Public Law Number 100-504, the Inspector General Act Amendments of 1988, Parts O and 19 of the Commission's rules ARE AMENDED as set forth below. These rules are effective upon publication in the *Federal Register*. *See* 5 U.S.C. §553(d).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

RULE CHANGES

Title 47, Parts 0 and 19 of the Code of Federal Regulations is amended to read as follows:

PART O COMMISSION ORGANIZATION

1. The authority citation for Part O continues to read:

Authority: Sec. 4, 303, Stat. 1066, 1082 as amended; 47 U.S.C. 154, 303 unless otherwise noted. Implement 5 U.S.C. 552, unless otherwise noted.

2. Section O.5 is amended by revising paragraph (a) in its entirety and removing paragraph (b)(8) to read as follows:

§0.5 General Description of Commission Organization and Operations.

(a) Principal staff units. The Commission is assisted in the performance of its responsibilities by its staff, which is divided into the following principal units:

(1) Office of Managing Director.
(2) Office of Engineering and Technology.
(3) Office of General Counsel.
(4) Office of Plans and Policy.

(5) Office of Public Affairs.
(6) Office of Legislative Affairs.
(7) Office of Administrative Law Judges.
(8) Review Board.
(9) Office of Inspector General.
(10) Mass Media Bureau.
(11) Common Carrier Bureau.
(12) Private Radio Bureau.
(13) Field Operations Bureau.

* * * * *

3. Section 0.13, including a new caption, is added to Part 0, Subpart A to read as follows:

Office of Inspector General

§0.13 Functions of the Office.

The Office of Inspector General is directly responsible to the Chairman as head of the agency. However, the Chairman may not prevent or prohibit the Office of Inspector General from carrying out its duties and responsibilities as mandated by the Inspector General Act Amendments of 1988 (Public Law Number 100-504) and the Inspector General Act of 1978 (5 U.S.C. Appendix 3), as amended. The Office has the following duties and responsibilities:

(a) Provide policy direction for and to conduct, supervise and coordinate audits and investigations relating to the programs and operations of the Federal Communications Commission.

(b) Review existing and proposed legislation and regulations relating to programs and operations of the Commission and to make recommendations in its required semiannual reports to Congress concerning the impact of such legislation or regulations on the economy and efficiency in the administration of these programs and operations, or the prevention and detection of fraud and abuse in such programs and operations.

(c) Recommend policies and conduct or coordinate other activities to promote economy and efficiency in the administration of Commission programs, or detect and prevent fraud and abuse in Commission activities. Coordinate with other governmental agencies and non-governmental entities on these matters.

(d) Keep the Chairman of the Commission -- and through him the other Commissioners -- and the Congress fully and currently informed concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of Commission programs and operations; recommend corrective action and report on the progress made in implementing such corrective action. In addition to providing the Chairman with the results of completed audits and inspections, the Inspector General shall prepare statutorily required reports, identified as such, to include:

(1) semiannual reports summarizing activities of the office during the preceding six month period (due to the Chairman by April 30 and October 31);

(2) special reports specifically identifying any serious or flagrant problems, abuses or deficiencies (due to the Chairman immediately upon discovery of these matters by the Inspector General).

4. The caption preceding former section 0.176, "Network Inquiry Special Staff," is removed.

5. The heading of Section 0.387 is revised to read as follows:

§0.387 Other National Security and Emergency Preparedness delegations; cross reference.

* * * * *

6. Section 0.231 is amended by revising paragraph (h) to read as follows:

§0.231 Authority delegated

* * * * *

(h) The head of the Internal Control and Security Office, Office of the Managing Director, is delegated authority to act as the "designated agency ethics official" within the meaning of sections 206 and 209 (10) of the Ethics in Government Act of 1978, Pub. L. 95-521, 92 Stat. 1824 (1978).

* * * * *

PART 19 EMPLOYEE RESPONSIBILITIES AND CONDUCT

1. The authority citation for Part 19 continues to read as follows:

Authority: E.O. 11222, 3 CFR 1965 Comp., 5 CFR 735.104, unless otherwise noted.

2. Section 19.735-105 is amended by revising paragraph (a)(1) to read as follows:

§19.735-105 Interpretation and advisory service.

(a) * * *

(1) The head of the Internal Control and Security Office is designated as the agency's ethics official for purposes of 5 CFR Parts 734 and 737. The General Counsel is designated as legal counselor for the Commission to provide guidance on matters relating to ethical conduct. The General Counsel is to serve as the Commission's designee to the Office of Personnel Management on matters covered by 5 CFR Part 735.

* * * * *

3. Section 19.735-107 is amended by adding a new paragraph (c) and redesignating existing paragraph (c) as paragraph (d) to read as follows:

§19.735-107 Disciplinary and other remedial action.

* * * * *

(c) The Inspector General will be promptly notified of all complaints or allegations of employee misconduct. The Inspector General will also be notified of the planned initiation of an investigation under this Part. Such notification shall occur prior to the initiation of the investigation required by subsection (a) of this section. The Inspector General may choose to conduct the investigation in accordance with these rules. Should the Inspector General choose to conduct the investigation, he will promptly notify the Chairman. The Inspector General will serve as the designated officer and be solely responsible for the investigation. In carrying out this function, the Inspector General may obtain investigative services from other Commission offices, other governmental agencies or non-governmental sources and use any other means available to him in accordance with Public Law 100-504 or 5 U.S.C. Appendix 3. The Inspector General will be provided with the results of all investigations in which he chooses not to participate.

* * * * *

4. Section 19.735-410 is amended by revising it to read as follows:

§19.735-410 Confidentiality of employees' statements.

Each statement of employment and financial interests, and each supplementary statement, shall be held in confidence and shall be retained in the Office of the Managing Director. Each employee charged with reviewing a statement is responsible for maintaining the statements in confidence and shall not allow access to or allow information to be disclosed from a statement except to carry out the purpose of this part or as otherwise required by law. Information from these statements shall not be disclosed except as the Office of Personnel Management or the Chairman may determine for good cause shown.

FOOTNOTES

[1] 5 U.S.C. Appendix 3.

[2] 5 U.S.C. App. 3, §2, as amended, Pub. L. No. 100-504, § 101. "The IGs are intended to act as independent factgatherers, with no vested interest in policy, or in particular programs and operations." H.R. Rep. No. 1020, 100th Cong., 2nd Sess. 28 (1988) *reprinted in* 1988 *U. S. Code Cong. & Ad. News* 3154, 3187.

[3] Pub. L. No. 100-504, §104.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 6, 1989

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON FURTHER AMENDMENT TO BELLSOUTH'S CEI PLAN FOR GATEWAY SERVICES

On March 30, 1989, the BellSouth Operating Companies, South Central Telephone Company and and Southern Telephone and Telegraph Company (BellSouth), filed a further amendment to the Comparably Efficient Interconnection (CEI) plan for gateway services, originally filed on April 20, 1988 (*See* Pleading Cycle Established for Comments on BellSouth's Plan to Offer CEI for Gateway Services, Public Notice, 3 FCC Rcd 2697 (1988)), and amended on November 2, 1988 (*See* Pleading Cycle Established for Comments on an Amendment to BellSouth's Plan to Offer CEI for a Gateway Service, 3 FCC Rcd 6843 (1988)). In the further amendment, BellSouth proposes to modify the method by which it will deliver calling number information (CNI) to its own unseparated gateway operations and to other customers, including enhanced service providers (ESPs). BellSouth states that, rather than using the interim architecture described in its original CEI plan to provide Automatic Number Identification (ANI), it will use common channel signalling to deliver Bulk Calling Line Identification (BCLID), once that service is available in November, 1989.

According to BellSouth, BCLID will permit the delivery of CNI to ESPs over dedicated data channels associated with an ESP's line-side connections to the central office. BellSouth states that all classes of local exchange subscribers will have the option of obtaining BCLID from the appropriate state tariff section, and all ESPs, including BellSouth's gateway operations, will retain the option of continuing to purchase any existing tariffed services.

Interested parties should file comments on this petition by **April 20, 1989,** and reply comments by **April 27, 1989,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Pat Hadley, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of BellSouth's further amendment can be obtained from ITS at (202) 857-3800.

For further information contact Pat Hadley, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-9342.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-81

In re Applications of

NANCY C. HART (hereafter Hart)	File No. BPH-870330MF
MIRROR BROADCASTING CORP.	File No. BPH-870331OE
JAMES K. ZAHN (hereafter Zahn)	File No. BPH-870331OS
SHARRYLE G. CHUNG EURICH AND ROBERT EURICH d/b/a MOUNTAIN AIR BROADCASTING (hereafter Mountain)	File No. BPH-870331OZ
ERIC R. HILDING (hereafter Hilding)	File No. BPH-870331PL
CATHARINA LOUISE OSBORN (hereafter Osborn)	File No. BPH-870408KC
GARY E. WILLSON (hereafter Willson)	File No. BPH-870331ON (DISMISSED HEREIN)

For Construction Permit
For a New FM Station on Channel
286B1 in Auberry, California

HEARING DESIGNATION ORDER

Adopted: March 31, 1989; Released: April 12, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. Section II, Item 4 of FCC Form 301 requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Hart and Mirror have not completed Item 4 correctly. Hart's application gives a post office box number as the residence address for applicant. Mirror does not list an address for its principal, Jeffrey D. Spokes. Accordingly, Hart and Mirror must submit amendments which give all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

3. Willson's September 16, 1988 and September 27, 1988 amendments are untimely. The former is unsigned, and therefore unacceptable. The latter requires a showing of good cause. The amendment simply corrects the applicant's answer to Section V-B, Item 11 to indicate that the proposed 3.16 mV/m contour will *not* completely encompass the community of license, and to acknowledge that Willson's geographic coordinates do *not* correspond to the site marked on the USGS topographic map. Since the September 27, 1988 amendment does not demonstrate good cause, the amendment is also unacceptable.

4. It is the policy of the Commission that if an amendment is unacceptable the original application is reviewed for acceptability. However, a review of Willson's original application and the timely July 1, 1987 and July 17 amendments indicates that all three are also defective and unacceptable for filing. With respect to the July 17 amendment, there is a discrepancy in the geographic coordinates as specified in Item 4, Section V-B (37^0 06' *05* " N.L., 119^0 19' *11* " W.L.) and as plotted on the topographic site map (37^0 06' *06* " N.L., 119^0 19' *17* " W.L.). Neither the HAAT in the original application (327.7 feet) nor in the July 1, 1987 amendment (1892.7 feet) equals that of the eight radials specified in Item 15, Section V-B of the original application (453 feet). The tower height AMSL specified in the engineering discussion of the July 1, 1987 amendment does not match the tower sketch submitted with that amendment. Finally, turning to the original application, it contains a discrepancy in the geographic coordinates as specified in Item 4, Section V-B (37^0 04' *26* " N.L., 119^0 25' *52* " W.L.) and as plotted on the topographic site map (37^0 04' *19* " N.L., 119,spb>0 25' *45* " W.L.); the equivalency of the ERP and HAAT (0.632 kW/453 feet) calculated from the eight radials in the original application would be that for a class A station. Accordingly, Willson's application will be dismissed as unacceptable for filing.[2] *See La Crescent Community Broadcasters*, 3 FCC Rcd 2332 (1988) and *Charles E. Phillips*, 3 FCC Rcd 2549 (1988).

5. *Mountain*. Our engineering review reveals that the combination of effective radiated power (0.71 kW) and antenna height above terrain (580 meters) would produce a 1 mV/m contour that extends out 40.7 km, when calculated by the method prescribed in 47 C.F.R. §73.2ll(b)(2) of the Commission's Rules. The maximum distance to the 1 mV/m contour permitted a Class Bl station operating at maximum facilities (25 kW effective radiated power and 100 meters antenna height above average terrain) is 39 km. This minimal discrepancy appears attributable to the imprecision inherent in manually ascertaining from the Commission's propagation curves the exact radiation value corresponding to the maximum permitted under the rules for antenna height proposed. *See Tate Broadcasting Limited*, 2 FCC Rcd 3208, 3209 (1987). However, Mountain shall amend its application by submitting the corrective data to the presiding Administrative Law Judge.

6. *Hilding*. Applicant responded "No" to Section III, page 6, FCC Form 301(Financial Qualifications). The material submitted by the applicant does not demonstrate his financial qualifications. Accordingly, an issue will be specified.

7. Applicants below have petitioned for leave to amend their applications. The accompanying amendments were filed after August 7, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Com-

mission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATE FILED
Mirror	10/14/87
Mountain	11/17/87, 3/7/89
Hilding	1/28/88, 6/3/88, 2/21/89

8. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Hilding, whether the applicant is financially qualified.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

IT IS FURTHER ORDERED, That Hart and Mirror shall submit the amendments, as specified in paragraph 2 above, to the presiding Administrative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That the Willson application IS DISMISSED as unacceptable for filing.

12. IT IS FURTHER ORDERED, That the Osborn petition to deny and motion to strike ARE HEREBY DISMISSED as moot.

13. IT IS FURTHER ORDERED, That Mountain shall submit an amendment which contains the information specified in Paragraph 4 above to the presiding Administrative Law Judge within 30 days after the release of this Order.

14. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Mirror, Mountain and Hilding ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Mirror, Mountain, Hilding.

15. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] On May 29, 1987, Osborn filed respective motions to dismiss the Hart and Hilding applications. On January 21, 1988, Osborn filed a petition to deny the Mountain application. The motions to dismiss and petition to deny are essentially petitions to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcasting Applications; Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in these petitions have not been considered. Accordingly, an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to Section 1.229.

[2] On January 21, 1988 and September 29, 1988, Osborn filed, respectively, a petition to deny and "Motion to Strike and Further Request for Denial"(Motion to Strike) directed to the Willson application, as amended. The petition to deny and motion to strike will be dismissed as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-82

In re Applications of

VIRGIL L. PEARMAN	File No. BPH-871110MK
W & B BROADCASTING, INC. (hereafter W &B)	File No. BPH-871110MU
ELIZABETHTOWN BROADCASTING CO., INC. (hereafter Elizabethtown)	File No. BPH - 871110NG

For Construction Permit
for a New FM Station
in Radcliff, Kentucky
Channel No. 278A (103.5 MHz)

HEARING DESIGNATION ORDER

Adopted: March 31, 1989; Released: April 12, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *W & B.* Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. W & B has not completed Item 4 correctly. W & B's application gives the city and state as the residence address for J. Michael Baldwin. Accordingly, W & B must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

3. W & B Broadcasting, Inc. proposes to increase the height of an existing tower to 351 feet above ground level and 1039 feet above mean sea level. The FAA, however, has only approved height increases to 342 feet above ground level and 1030 feet above mean sea level. Accordingly, W & B must amend its application or seek approval from the FAA for additional height increase. Since the FAA has not determined that the antenna currently proposed by W & B would not constitute a hazard to air navigation, an issue with respect thereto will be specified and the FAA made a party to the proceeding.

4. *Elizabethtown.* Elizabethtown proposes to locate its transmitting antenna approximately 9.9 miles from its FM station WKMO in Hodgenville, Kentucky. Elizabethtown has indicated its intent to divest itself of WKMO in the event of grant of the referenced application.

5. *Other Matters.* Data submitted by the applicants indicate there would be significant difference in the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. W & B petitioned for leave to amend its application on July 25, 1988, August 12, 1988 and November 15, 1988. Elizabethtown petitioned for leave to amend its application on November 23, 1988. The accompanying amendments were filed after January 23, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from these amendments will be disallowed.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by W & B would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That W & B shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

10. IT IS FURTHERED ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

11. IT IS FURTHER ORDERED, That in the event of grant of Elizabethtown's application, the permittee will be required to divest itself of all interest in and sever all connections with WKMO (Hodgenville, Kentucky) prior to the commencement of program test authority.

12. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by W & B and Elizabethtown ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to

the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-83

In re Applications of

RFI ASSOCIATES (hereafter RFI)
Req: Channel 203Bl
Ithaca, New York — File No. BPED-861229MA

FAMILY LIFE MINISTRIES RADIO, INC.
(hereafter Family)
Req: Channel 203Bl
Spencer, New York — File No. BPED-870608MB

For a Construction Permit
for a New Non - Commercial
Educational FM Station

HEARING DESIGNATION ORDER

Adopted: March 31, 1989; Released: April 12, 1989

By the Assistant Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *RFI.* Applicant's values for its HAAT at the 90' and 135' radials, Item 15, Section V-B, Page 3, Form 301, differ from the values obtained from an FM Branch study by approximately 20%. Additionally, the figure for RFI's ground elevation AMSL in its antenna sketch should specify 1440 feet, as indicated in Section V-G of its application, not 1640 feet. These discrepancies can be confidently and reliably resolved. Moreover, using either of the calculations, RFI's proposal fully complies with Commission Rules. These errors have no effect on the acceptability of RFI's application which complies with all of our acceptance requirements. However, RFI shall amend its application by submitting the correct calculations to the presiding Administrative Law Judge.

3. RFI responded "no" to Section III, FCC Form 340 (Financial Qualifications). Exhibit 5 states that RFI "is in the process of assembling the requisite financial showing." Accordingly, an issue will be specified.

4. RFI is an unincorporated association with three trustees, which is seeking a charter from the New York State Board of Regents to incorporate as a not-for-profit educational corporation with seven trustees. RFI shall amend its application to reflect its new status and provide Section II, Table I information within 30 days of the receipt of notice of such action by the State.

5. *FAMILY.* The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies even though there may be only a few members of minorities residing within the proposed service area. Although Family has filed such statement, it is deficient. Family has not listed any specific local recruitment sources for women or minorities. Accordingly, applicant will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

6. On August 10, 1987, RFI filed a petition to deny the Family application. The petition to deny is essentially a petition to specify issues. Since the Commission's *Repon and Order* in re *Revised Procedures for the Processing of Contested* Broadcasting *Applications; Amendments of Part* 1 *of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in these petitions have not been considered. Accordingly, an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to Section 1.229.[1]

7. *Share - time Arrangement.* The applicants have indicated that they have discussed and rejected the concept of a share-time agreement. Nonetheless, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing, or at any time during the course of the hearing from participating in negotiations with a view toward establishing a share-time agreement between themselves.

8. *307 (b).* The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining pursuant to 47 U.S.C. § 307(b) which of the proposals would better provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

9. *Areas and Populations.* Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applications for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to RFI whether the applicant is financially qualified.

2. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of 47 U.S.C. § 307(b), which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between the applicants should not be based solely on considerations relating to 47 U.S.C. § 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That in accordance with paragraph 2 hereinabove, RFI shall submit the corrected data to the presiding Administrative Law Judge within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That RFI shall submit the information specified in paragraph 4 above to the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Family shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

15. IT IS FURTHERED ORDERED, That the RFI petition to deny IS DISMISSED and the WSKG informal objection IS DISMISSED AS MOOT.

16. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] By letter dated April 26, 1988, WSKG Public Telecommunications Council (WSKG) filed an informal objection against the Family application. WSKG incorporates by reference its petition to deny, filed October 1, 1987, against Family's application for a new noncommercial FM station at Elmira, New York (File No. BPED-870209MI). The WSKG petition in Elmira was denied by the Chief, FM Branch. Accordingly, the WSKG informal objection will be dismissed as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-80

In re Applications of

SAINTE LIMITED	File No. BPCT-881011KG
BLACKSTAR COMMUNICATIONS, INC.	File No. BPCT-881121KK
TELEVENTURE BROADCASTING, INC.	File No. BPCT-881128KF
LORRAINE WALKER ARMS	File No. BPCT-881202KK
P Z ENTERTAINMENT PARTNERSHIP, L.P.	File No. BPCT-881205KG
CHANNEL 15 - DANIEL R. EWING, LIMITED PARTNERSHIP	File No. BPCT-881205KH
MEDIA PROFILES, INC.	File No. BPCT-881205KI
TIERRA ALTA BROADCASTING, INC.	File No. BPCT-881205KJ
NORTH LAS VEGAS BROADCASTING CO., INC.	File No. BPCT-881205KK
ECHONET CORPORATION	File No. BPCT-881205KM

For Construction Permit
Las Vegas, Nevada

HEARING DESIGNATION ORDER

Adopted: March 27, 1989; Released: April 13, 1989

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications to construct a new commercial television station on Channel 15, Las Vegas, Nevada.[1]

Lorraine Walker Arms

3. Lorraine Walker Arms, an individual applicant in this proceeding is President, Director and sole stockholder of A & A Broadcasting Corporation, licensee of radio station KRLV(FM), Las Vegas, Nevada. This interest raises a multiple ownership question. However, Ms. Arms has pledged to divest her interest in radio station KRLV(FM) if she is the successful applicant in this proceeding. Accordingly, a grant of a construction permit to Ms. Arms will be appropriately conditioned.

P. Z. Entertainment Partnership, L. P. (PZ)

4. Section II, Item 8(a & b), inquires if individuals or entities holding nonattributable interests of 5% or more in the applicant have an attributable ownership interest or officership in the media or if any member of the immediate family of the applicant has any interest in or connection with any other broadcast station or pending broadcast application. PZ has responded "N/A to these questions. A "yes" or "no" answer is required. PZ will be required to submit an amendment with the proper response to Section II, Item 8 (a & b), to the presiding Administrative Law Judge within 30 days of the release of this Order.

5. PZ has not certified that it is financially qualified. Accordingly, PZ will be given 30 days from the date of release of this Order to review its financial proposal in light of Commission requirements, to make any changes that may be necessary, and if appropriate, to submit a certification to the Administrative Law Judge in the manner called for in Section III, as to its financial qualifications. If PZ cannot make the required certification, it shall so advise the Administrative Law Judge who shall then specify an appropriate issue.

Channel 15 - Daniel R. Ewing Limited Partnership (Ewing)

6. Ewing gave a negative response to question 3(a), Section II, FCC Form 301. Thus, it does not certify the noninvolvement of its limited partners in the management and operation of the proposed station. Ewing will be required therefore, to identify all limited partners and provide for each such partner, the information required by FCC Form 301. Ewing will be directed to provide the information within thirty (30) days after the release of this Order.

Echonet Corporation (Echonet)

7. The application of Echonet specifies a maximum visual effective radiated power of 5,000 kW and an antenna height above average terrain of 719 meters. This combination of power and height exceeds the maximum permitted by Section 73.614 of the Commission's Rules. Accordingly, Echonet will be required to submit a corrective amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.[2]

8. No determination has been reached that the tower height and location proposed by P.Z. Entertainment, Tierra Alta Broadcasting, North Las Vegas Broadcasting and Echonet would not each constitute a hazard to air navigation. Accordingly, an issue regarding this matter will be specified.

9. The effective radiated visual power, antenna height above average terrain and other technical data submitted by the applicants indicate that there would be a signifi-

cant difference in the size of the area and population that each proposes to serve. Consequently, the areas and populations which would be within the predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant would serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to P.Z. Entertainment Partnership, L.P., Tierra Alta Broadcasting, Inc., North Las Vegas Broadcasting Co., and Echonet Corporation, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

12. IT IS FURTHER ORDERED, That the amendment filed by Blackstar Communications, Inc. on March 2, 1989, will be accepted for Section 1.65 purposes only.

13. IT IS FURTHER ORDERED, That in the event of a grant of the application of Lorraine Walker Arms, it will be conditioned as follows:

Prior to the commencement of operation of the television station authorized herein, permittee shall certify to the Commission that Lorraine Walker Arms has divested herself of all interest in and connection with the licensee of Station KRLV(AM), Las Vegas, Nevada.

14. IT IS FURTHER ORDERED, That PZ Entertainment Partnership, L.P. shall submit an amendment with the proper response to Section II, Item 8 (a & b), to the presiding Administrative Law Judge within 30 days of the release of this Order.

15. IT IS FURTHER ORDERED That PZ Entertainment Partnership, L.P. shall, within 30 days of the release of this Order, submit a financial certification in the form required by Section III, FCC Form 301, or advise the Administrative Law Judge that the certification cannot be made, as may be appropriate.

16. IT IS FURTHER ORDERED, that Channel 15-Daniel R. Ewing Limited Partnership shall submit, an amendment identifying all limited partners and provide, for each such partner, the information required by FCC Form 301 to the presiding Administrative Law Judge within 30 days of the release of this Order.

17. IT IS FURTHER ORDERED, That Echonet Corporation shall submit, as an amendment, a showing of compliance with Section 73.614 of the Commission's Rules pertaining to power and antenna height above average terrain, to the presiding Administrative Law Judge, within 30 days of the release of this Order.

18. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

19. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of $6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

FOOTNOTES

[1] On March 2, 1989, Blackstar filed a petition for leave to amend its application pursuant to Section 1.65 of the Commission's Rule. The accompanying amendment reported that Victor H. Brown is no longer a member of the board of directors of Blackstar. The amendment is accepted for 1.65 purposes only.

[2] Reduction of height or power may require the submission of new engineering data such as new contour maps, new vertical tower sketch, and changed area and population figures. If so, this information must be submitted as part of the required amendment.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-339

In the Matter of

Establishment of a Program
to Monitor the Impact of
Joint Board Decisions

MEMORANDUM OPINION AND ORDER

Adopted: April 4, 1989; Released: April 13, 1989

By the Chief, Common Carrier Bureau:

1. The United States Telephone Association (USTA) requests a further extension of time for local exchange carriers (LECs) to file reports on the jurisdictional revenue requirement shifts that may result from the conformance of the Separations Manual to the revised Part 32 Uniform System of Accounts (USOA). The new Manual was codified in Part 36 of the Commission's Rules which became effective along with the revised USOA on January 1, 1988. USTA requests an extension of the filing date for the first of two reports from May 1, 1989, until thirty days after the date that the Automated Reporting Management Information Systems (ARMIS) Access Report (Schedule D) is filed and the jurisdictional revenue requirement shifts reporting model and guidelines have been released by the Commission. In the *Monitoring Report and Order*,[1] the Commission required that LECs report shifts of 5 percent or more in state or interstate annual revenue requirements resulting from conformance and simplification of the Separations Manual in Docket No. 86-297. In addition, the Commission required that LECs submit two reports, one at the beginning of March 1989 for calendar year 1988 and one at the beginning of March 1990 for calendar year 1989. We granted USTA's earlier request for an extension of the March 1989 filing date until May 1, 1989.[2] For reasons discussed below, we grant, in part, USTA's request for a further extension.

2. In the *Monitoring Reconsideration Order*, [3] the Commission requested that USTA and other parties submit proposed modeling approaches for reporting the impacts of the new Separations rules. On August 29, 1988, in response to our request, USTA filed comments that included a proposed modeling approach in which the jurisdictional allocations for calendar year 1988 and 1989 would be compared to the allocations for calendar year 1987. At that time, USTA requested an extension from March 1, 1989, to May 1, 1989, for the LECs to file the reports because of the short amount of time the carriers would have to analyze the data while simultaneously compiling data for the March 30, 1989, filing of the ARMIS Access Report. On January 30, 1989, we granted USTA's request so that the Joint Board Staff would have the most complete and accurate data compilation to effectively evaluate the impact of the new separations rules.

3. In its request for a further extension, USTA notes that on February 21, 1989, it requested an extension of the filing date for the ARMIS Access Report until sixty days after the release of the revised report form with specifications. In addition, USTA notes that on March 15, 1989, we granted its request.[4] USTA states that the ARMIS Access Report form has not yet been released and, therefore, the LECs cannot determine the date by which they must file the Access Report. As a result, USTA contends that the filing date for the jurisdictional revenue requirement report should be extended to coincide with the extended filing date for the ARMIS report. USTA believes that a grant of its request would eliminate the need for any additional extension requests in the future. In addition, USTA states that an additional extension will not have any adverse impacts, due to the lack of evidence to date of any public detriment from conformance. USTA also believes that the additional time will allow the carriers an opportunity to obtain more consistent and reliable data. Furthermore, USTA states that the local carriers will have more time to respond to other pending data requests, such as the Universal Service Fund data submission.

4. We grant USTA's request in part and deny it in part. We agree with USTA that the timely and consistent completion of jurisdictional revenue requirement shifts reports by the LECs is dependent on the release of the reporting form and guidelines. We do not believe, however, that the reporting of jurisdictional revenue requirement shifts is similarly dependent on the filing of the ARMIS data. Based on previous statements made by USTA concerning jurisdictional revenue requirement shifts[5], we believe that because many LECs perform monthly separations studies or updates as a normal business practice, they already have the data necessary to complete the jurisdictional revenue requirement reports. Moreover, all LECs will have the necessary data when the form and guidelines are released because that will be within a reasonable time of the closing of their books for 1988. The availability of that data is not dependent on the completion of the ARMIS Access Report.[6] Because we believe that an extension of time will be consistent with the Docket 86-297 Joint Board's intention to monitor the impact of the new Separations Manual on state and interstate revenue requirements using complete and consistent 1988 data we grant USTA's request for an extension from May 1, 1989, until thirty days after the Commission has released the jurisdictional revenue requirement shift reporting form and guidelines.

5. ACCORDINGLY, IT IS ORDERED, That the United States Telephone Association's request for a further extension of time to file the 1988 jurisdictional revenue requirement report in CC Docket No. 87-339 IS GRANTED to the extent provided in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, 2 FCC Rcd 5266 (1987) (*Monitoring Report and Order*). This decision was based, in part, on the recommendation of the Docket 86-297 Joint Board. *See* Amendment of Part 67 (new Part 36) of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72, 80-286 and 86-297, 2 FCC Rcd 2639 (1987) (*Separations Report and Order*).

[2] Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, 4 FCC Rcd 1405 (1989).

[3] Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, FCC 88-244, released July 19, 1988 (*Monitoring Reconsideration Order*).

[4] USTA is mistaken that an Order was released on March 15, 1989, extending the date for filing the ARMIS Access Report. The Order to which USTA refers extends the filing date for the Annual Report Form M, DA 89-275, released March 15, 1989. On March 27, 1989, we released an Order delaying the date for filing the ARMIS Access Report until ninety days after the release of the revised Access report and its specifications. *See* Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67 and 69 of the FCC's Rules, DA 89-344), released March 27, 1989.

[5] *See* Comments of USTA at 6, in CC Docket No. 87-339, filed August 29, 1988.

[6] We believe that an extension of the filing date until thirty days after the release of the form and guidelines will not unduly burden the carriers' resources.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166,
Phase I

In the Matter of

Investigation of Special Access
Tariffs of Local Exchange Carriers

ORDER ON REMAND

Adopted: March 28, 1989; Released: April 13, 1989

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. The U.S. Court of Appeals for the District of Columbia Circuit has remanded to the Commission several issues from the captioned investigation raised in a petition for review filed by the Western Union Corporation (Western Union).[1] At issue are various cost allocation and ratemaking issues arising from the special access tariffs filed by local exchange carriers (LECs) in December 1984. We invite comment interested parties on the manner in which these issues can best be resolved.

II. REMANDED ISSUES

A. *Allocation of Costs in Determining Loop Rates*

2. The first of the three remanded issues involves the allocation of costs between the loop component of special access circuits and the trunk component of these circuits.[2] Specifically, the court concluded that the Commission failed to consider how much of the cost of equipment (*e.g.*, pads and repeaters) needed to provide two special access rate elements -- voice grade performance (VGP) and facilities interface (FACIF) -- should be allocated to the loop component, as opposed to the channel mileage component.

3. Accordingly, it is now necessary for the Commission to address this allocation issue. To that end, we request comment by interested parties on the following questions: (1) whether the existing record is adequate to determine how much of the costs of pads and repeaters in VGP and FACIF categories is properly chargeable to the loop component of voice grade service, including metallic service, and how much is chargeable to the trunk component; (2) the means by which the record, if inadequate, could most easily and expeditiously be supplemented; and (3) whether this issue can be resolved without supplementing the record.

B. *Allocation of Three Types of Plant Investment to Metallic Service*

4. The second remanded issue involves the allocation of central office equipment (COE) costs, station apparatus costs, and certain PBX costs. In the tariff filed in December 1984, COE costs had been allocated to loop service and charged to all types of circuits, including metallic circuits. Western Union argued in its petition before the court, and previously in its petition against the tariffs and petition for reconsideration, that none of the COE is needed for basic metallic service. The court determined that the Commission failed to address this argument.

5. Western Union raised two arguments relating to station apparatus and PBX. It argued, first, that because station apparatus and PBX are located on the customer's premises, this equipment is "user specific," and such costs should not be included in the general rate base. Western Union argued, second, that even if the Commission rejected the "user specific" argument, these costs should not be allocated to metallic circuits. The court concluded that while the Commission's *Special Access Order* rejected Western Union's "user specific" argument, that Order did not discuss Western Union's contention that because metallic loop users receive no benefit from station apparatus and PBX equipment, those users should not be required to contribute to the recovery of station equipment and PBX costs.

6. Accordingly, we invite comment from interested parties on (1) whether provision of the loop component of metallic service requires use of COE; (2) if so, the extent to which COE costs should be allocated to metallic service; and (3) whether this determination can be made from the existing record or requires supplemental information.

C. *Disproportionate Rates Charged Users of 2 - Wire Metallic Circuits*

7. The third remanded issue relates to the Commission's rejection, in the *Order Denying Reconsideration*, of Western Union's argument that the LECs' reduction in 2-wire rates (compared to 4-wire rates) for telegraph and voice grade services, mandated by the *Special Access Order*, should have been extended to 2-wire metallic circuits as well. Interested parties should therefore address (1) whether a basis exists in the record for treating 2-wire metallic circuits differently from 2-wire telegraph and voice grade circuits; (2) whether the question can be resolved on the basis of the existing record; and (3) if not, what additional information will be required to resolve the question.

III. CONCLUSION

8. Responses to the questions stated above should be submitted on or before May 15, 1989. Replies should be submitted on or before May 29, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Western Union Corporation v. FCC, 856 F.2d 315 (D.C. Cir. 1988). The Commission Orders under review, which examined various aspects of the special access services provided by local exchange carriers, are Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, FCC 86-52, released Jan. 24, 1986, 51 Fed. Reg. 15691 (Apr. 25, 1986) (*Special Access Order)* and Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, *on reconsideration*, 1 FCC Rcd 427 (1986) (*Order Denying Reconsideration).*

[2] The loop connects the customer's premises to the LEC's serving wire center (SWC), while the trunk connects SWCs.

Before the
Federal Communications Commission
Washington, D.C. 20554

MARCH 29, 1989
LETTER

Released: April 12, 1989

Allan W. Roberts
President
All Communications of Naples, Florida
951 Manatee Road
Naples, Florida 33961

Dear Mr. Roberts:

This refers to your pending application for renewal of the license of Station WRGI(FM), Naples, Florida (File No. BRH-880930XJ). Review of the station's equal employment opportunity (EEO) record from the date that you were granted the license in April 1987 to October 1, 1988, the date that you filed your renewal application, reflects a failure to comply with the Commission's Equal Employment Opportunity Rules.

Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and that it establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit and promote qualified minorities and women and the licensee's on-going assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool for each hiring opportunity.

When the renewal application indicates an absence of evidence of discrimination and an adequate record of EEO efforts, the application is granted, if otherwise appropriate. When the application indicates evidence of discrimination or an inadequate record of EEO efforts, the Commission may impose a variety of sanctions, such as reporting conditions, renewal for less than a full term, forfeiture or a combination thereof. Further, the Commission may designate the renewal application for hearing where the facts so warrrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987).

Our review of your renewal application reveals no evidence of discrimination but does reveal an inadequate record of EEO efforts. It appears that you utilized only one minority recruitment source since April 1987. That source was contacted only once. That contact consisted of a single letter requesting referrals for staff positions at the station without mention of specific available positions. There is no evidence that minorities were recruited from this source or that you made any follow-up attempts to contact this source. You did not expand your list of recruitment sources until June 1988, and made no efforts to contact *minority* recruitment sources until after filing the instant renewal application.

Moreover, it does not appear that you undertook a meaningful self-evaluation of your EEO program, as required by the rules. In this regard, you maintained no records concerning the race, nationality or gender of the applicants interviewed for positions at the station.

Your 1987 and 1988 employment reports further indicate no minorities on your staff of 16 full-time employees.[1] During that time, you had 18 hiring opportunities on your overall full-time staff and six hiring opportunities on your upper-level staff.[2]

Based on the foregoing, we conclude that during the period you have held the license for Station WRGI-FM, you failed to exercise best efforts to comply with the Commission's EEO rules. In this regard, you did not take meaningful and regular steps to recruit minorities. Moreover, you failed to analyze the station's efforts to recruit, hire, promote and retain minorities. Thus, you have repeatedly failed to comply with the Commission's affirmative action provisions set forth in Sections 73.2080(b)(5) and 73.2080 (c)(2) and (5) of the rules. Accordingly, while, in the absence of evidence of discrimination, we find that grant of the application will serve the public interest, we also find it appropriate to grant the license renewal with reporting conditions in order to monitor future performance.

IT IS ORDERED, That the application of All Communications of Naples, Inc. for renewal of license of Station WRGI(FM) IS GRANTED, subject to the reporting conditions specified herein.[3]

IT IS FURTHER ORDERED, That the new licensee of Station WRGI-FM, H & D Communications Limited Partnership, submit an original and one copy of the following information on March 15, 1990, March 15, 1991 and March 15, 1992:

(a) For the March 15, 1990 report, a list of all job vacancies during the twelve months preceding February 14, 1990, and for the March 15, 1991 and March 15, 1992 reports, a list covering the 12 months preceding February 14, 1991 and February 14, 1992, respectively, indicating the job title and full or part-time status of the position, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired.

(b) a list of employees as of the February 14, 1990 payroll period for the first report and as of the February 14, 1991 and February 14, 1992 payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest paid classification), date of hire, sex and race or national origin; and

(c) details concerning the station's efforts to recruit minorities for each position filled during the 12 month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment.

In addition, you may submit any information you believe relevant with regard to the station's EEO performance and your efforts thereunder. The reports are to be filed with the Secretary of the Commission to the attention of the Mass Bureau's EEO Branch.

Should you have any questions regarding this action or require further information concerning the employment reports, you may call the Mass Media Bureau's EEO Branch (202-632-7069).

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In response to our letter of inquiry dated January 13, 1989, you stated that one Hispanic employee was hired for an upper-level position during the current year but left before being reported on your Annual Employment Report. There is no evidence of other minority hires.

[2] The available labor force for the Naples, Florida Metropolitan Statistical Area is 14.0% minority (3.6% Black, 9.9% Hispanic, 0.5% other).

[3] In this regard, we are mindful of an assignment of license from All Communications of Naples, Florida to H&D Communications Limited Partnership (File No. BALH-881114HT), and we intend that the reporting conditions should apply to the assignee upon the consummation of the sale.

SEPARATE STATEMENT
OF
COMMISSIONER PATRICIA DIAZ DENNIS

Re: Renewal of license WRGI (FM), Naples, Florida

I concur in granting this renewal application subject to reporting conditions. However, I would have also imposed a forfeiture. In eighteen months as a licensee, WRGI hired eighteen full-time employees. [1] Yet, during that period, WRGI made virtually no effort to recruit minorities. WRGI wrote one letter, to one minority recruitment source, and even that letter did not mention a specific vacancy at the station. That is not good enough.

The recruitment obligations we place on licensees are neither complicated nor onerous. We ask, at the very minimum, that they contact a variety of recruitment sources in an effort to attract qualified minority and women applicants. We should not second-guess licensees that make a good faith effort, but for stations such as WRGI, that make only a perfunctory pass at compliance, I would support forfeitures in addition to reporting conditions.

FOOTNOTE FOR STATEMENT

[1] Turnover was over 100 percent. The licensee's staff is composed of 16 full-time employees.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-556

In re Applications of

ROCKLEDGE RADIO, LTD.	File No. BPH-861104MB
BEN L. UMBERGER	File No. BPH-861105MB
SHAW ENTERPRISES, INC.	File No. BPH-861105ME
ROCKLEDGE BROADCASTING ASSOCIATES LIMITED PARTNERSHIP	File No. BPH-861105MF
Michael H. Kahn d/b/a ORION COMMUNICATIONS, LTD.	File No. BPH-861105MH
D.V.R. BROADCASTING (A GENERAL PARTNERSHIP)	File No. BPH-861105MK

For a Construction Permit for a
New FM Station on Channel 274A
(102.7 MHZ)
in Rockledge, Florida

Appearances

Robert J. Buenzle and *Henry E. Crawford* on behalf of Rockledge Radio, Ltd.; *Stephen C. Simpson* on behalf of Ben L. Umberger; *Ann C. Farhat* on behalf of Shaw Enterprises, Inc.; *Herbert D. Miller, Jr.* on behalf of Rockledge Broadcasting Associates Limited Partnership; *James J. Popham* and *Bradford D. Carey* on behalf of Michael A. Kahn d/b/a Orion Communications, Ltd.; *Peter Gutmann* on behalf of D.V.R. Broadcasting (A General Partnership); and *Norman Goldstein* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
EDWARD J. KUHLMANN

Issued: April 3, 1989; Released: April 14, 1989

1. The six applications remaining in the caption and nine other applications now dismissed, were designated for hearing on December 23, 1987 to consider on a comparative basis which mutually exclusive proposal should be granted. *Hearing Designation Order*, 2 F.C.C. Rcd 7508 (1987). The following issues will be decided in this decision:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced, pursuant to the foregoing issues, which of the applications should be granted, if any.

2. A prehearing conference was held on February 24, 1988. *Order*, FCC 88M-520, released March 1, 1988; Tr. 1-41. Written testimony was exchanged on July 25, 1988 and hearing sessions to cross-examine on that testimony were held on August 15, 16, and 17, 1988. The hearing record was closed on August 17, 1988. Tr. 896; *Order*, FCC 88M-2738, released August 23, 1988. Proposed findings and conclusions of law were filed on October 17, 1988 and replies were filed on October 27, 1988.

Umberger's Failure to Submit Proposed Findings and Conclusions

3. Shaw objects to consideration of Umberger's application because he failed to file proposed findings of fact and conclusions of law. The parties in this proceeding were ordered to file proposed findings of fact and conclusions based on the findings. *Memorandum Opinion and Order*, FCC 88M-2738, released August 23, 1988. Instead Umberger filed four pages of findings which, with the exception of the joint exhibit on comparative coverage, cites only Umberger's slim Exhibits 1 and 2. (In fact, Umberger copies his hearing testimony, changing only his reference to himself from the first person to the second person, he.) No mention is made of the examination of Mr. Umberger and no findings are proposed for the other applicants. Umberger states that he incorporates the proposed findings and conclusions of law with respect to other parties filed by D.V.R. DVR makes no mention of any such agreement and permission was not sought from the presiding officer. In any event, DVR concluded that DVR should be granted and Umberger does not state that that conclusion should be ignored and, if so, why. Umberger's conclusions consist of three pages of routine recitation of legal principles to apply but there is no reference to record facts and no analysis. This is a complex six party proceeding with four volumes of transcript and numerous exhibits.

4. There is a need for each applicant to diligently prosecute its application and show who should succeed. Every party has that obligation to elucidate which proposal would serve the public interest. *Wolverine Radio Co., Inc.*, 49 F.C.C. 2d 1038, 1039 (Review Bd. 1974).

5. While Umberger filed a document which he calls a reply, it is no reply at all. It amounts to a brief, tardy statement of the facts. Insofar as it provides any analysis of the other applicants, it raises substantive new arguments, which the other parties had no opportunity to address. The document is eleven pages of text and of those, all but one address the other applicants' cases. There is no analysis or reply to what the other applicants proposed except for the one page devoted to Umberger. In other words the substance of the filing is not a reply and does not excuse Umberger's failure to file proposed findings and conclusions.

6. Section 1.264 provides that proposed findings of fact "shall set out in detail and with particularity *all* basic evidentiary facts developed on the record (with appropriate citations to the transcript of the record or exhibit relied on for each evidentiary fact) supporting the conclusions proposed by the party filing same." Section 1.264 also provides that proposed conclusions "shall be separately stated." Umberger has not complied with Section 1.264. Section 1.263(c) provides that in the absence of a showing of good cause the failure to file proposed findings of fact and conclusions may be deemed a waiver of the right to participate further. Shaw raised that possibility and Umberger did not respond. Umberger has waived its right to participate further and no analysis will be made of Umberger's case.

FINDINGS OF FACT

Comparison of the Applicants

Diversification of the Media of Mass Communications

7. *RRL* (applicant designations in this decision are those adopted in the caption of the HDO) and its owners have no interests in the media of mass communications. RRL Exh. 4.

8. *Shaw* has no interests in the media of mass communications. Shaw Exh. 3, at 2. James H. Hummel, who represents that he owns 51% of the voting stock and 26% of the equity in Shaw, provides voice-overs for a weekly three-hour Saturday evening program on WCXL-FM, Vero Beach, Florida. Shaw Exh. 1, at 4. He is not employed by the station, however. *Id.* Wayne L. DiLucente, who represents that he owns a non-voting 49% equity interest in Shaw, is an officer and director of Treasure Coast Media, Inc., which is the licensee of WCXL-FM, Vero Beach, Florida. Shaw Exh. 3, at 3. Mr. DiLucente is the general manager of WCXL and his spouse, Sally Smalley DiLucente, is the president, 50% owner, station manager and director. *Id.*

9. *RBA* and its general partner have no interests in the media of mass communications. RBA Exh. 3, at 1. RBA's four limited partners are both limited partners and owners, officers and directors of the general partner, Commonwealth Broadcasting Company, in Ocean State Broadcasting Limited Partnership. *Id.* Ocean State is the licensee of WWON and WNCK-FM, Woonsocket, Rhode Island. Commonwealth Broadcasting is the licensee of WVPO and WSBG- FM, Stroudsburg, Pennsylvania. Bernard Barczak, a 3.5% RBA limited partner, owns 10% of Commonwealth in which he is secretary, treasurer, and a director; he is a 1% limited partner in Ocean State. *Id.*, at 2. William S. Cerny, a 25.5% limited partner in RBA, owns 50% of Commonwealth in which he is president and a director, and 29% in the limited partnership of Ocean State. *Id.* George Chopivsky, Jr., who is a 25.5% limited partner in RBA, owns 25% of Commonwealth in which he is vice president and a director and 21% of the limited partnership in Ocean State. *Id.* George Wheeler, who owns 25.5% of RBA, owns 15% of Commonwealth, in which he is vice president and director and 16% of the limited partnership interest in Ocean State. *Id.*

10. William S. Cerny is also president, director and 12.2% owner of DeKalb Radio Studios, Inc., licensee of stations WLBK and WDEK-FM, DeKalb, Illinois. RBA Exh. 3, at 2. The remaining interests in DeKalb Radio are owned by Mr. Cerny's parents, brother and sister. *Id.* The RBA limited partners also own a one-seventh interest in a CP for a new FM facility assigned to Holmes Beach, Florida.

11. *Orion* has no mass media interest. Orion Exh. 2.

12. *DVR* has no mass media interests. DVR Exh. 1, at 2. However, DVR's partners are currently employed at WITS-AM and WCAC-FM, Sebring, Florida. DVR Exh. 1, at 2; DVR Exh. 2, at l; DVR Exh. 3, at 1; DVR Exh. 4, at 1. Douglas Peralta is the general manager of the stations, Valree Peralta is the business manager, public service director, operations director and announcer and Robert Rowland is the program director and announcer. *Id.* The stations are owned by Ms. Peralta and Mr. Rowland's parents and Mr. Peralta's mother and father-in-law. Tr. 804. The partners did not report these positions to the Commission until March 1988 when they filed their integration and diversification statement; DVR's application was not amended. Tr. 830. No promise was made to divest this interest until March 1988, although the partners began working at the stations on December 16, 1986. Tr. 837-38, 830-31. Sebring is approximately 70 miles from Rockledge.

Integration of Ownership and Management

13. *RRL* is a Florida limited partnership with one general partner, Charles L. Sampson, who owns a 25% equity interest, and two limited partners, Richard H. Adams, Jr. and Joseph T. Caruso, each of whom owns a 37.5% equity interest. RRL Exh. 1. Mr. Sampson has promised to work full time, 40 hours per week, as the proposed station's general manager. RRL Exh. 3. Mr. Sampson will select the staff for the station, choose programming, approve budgets and management procedures at the station. *Id.* He will also ascertain community needs and insure the station responds to them. *Id.* Mr. Sampson has always lived in the Rockledge locality; he lives in Cocoa, Florida, which is within the proposed city grade signal for the station. RRL Exh. 1. Mr. Sampson belongs to the Brevard NAACP, he belonged to the community service organization, Brevard Gents, from 1983-86, and, since 1986, he has belonged to the Florida Highway Patrol Auxiliary. RRL Exh. 5. He has participated in local politics, belonged to the Youth Club of America, and is a member of a church in Cocoa. RRL Exh. 5.

14. RRL's partnership agreement provides that Mr. Sampson, the only general partner, is committed to providing $10,000 in capital and that the two limited partners will provide $15,000 each. RRL Exh. 7, at 4. The general partner has no obligation to lend money to the partnership but the limited partners do. RRL Exh. 7, at 5. That portion of the partnership agreement states that the named limited partners have agreed to advance loans as set forth, but no partners are named and no loan amounts are listed in the agreement. *Id.* Mr. Sampson testified that the error was one he had not noticed until the weekend before the hearing. Tr. 69. He referred to the failure to provide for the loan obligations by each partner as a "typographical" error, which would be corrected when he returned to Florida. Tr. 69. Mr. Sampson said that both limited partners were obligated to lend $80,000 each but no loan had been made. Tr. 70. The partnership agreement provides that the limited partners, if they had agreed to loans, could not ask for repayment until the partnership assets exceed the value of the combined value of the capital accounts of the partners. RRL Exh. 7, at 6. At the

time Mr. Sampson testified, he said the limited partners had only paid $1,500 in capital contributions. Tr. 70. At another point he said they had contributed $10,000. Tr. 77, 79. In any event, Mr. Sampson said that Mr. Adams and Mr. Caruso decided what amounts would be contributed. Tr. 132. The money to be contributed was based on Mr. Buenzle's estimate of the cost of the proceeding. Tr. 130. However, when the assets exceed the capital accounts, the limited partners may demand repayment of their loans within 30 days. RRL Exh. 7, at 6. The demand may not exceed the excess of the assets over the capital accounts. *Id.* Mr. Sampson stated that it was his understanding that once profits exceeded total operational costs, the limited partners could demand their loans repaid. Tr. 136. The general partner cannot request a loan until the capital contributions of $40,000 have been made. RRL Exh. 7, at 6. Limited partners of RRL may vote on the sale, exchange, lease, mortgage, pledge or transfer of the assets except those made in the ordinary course of the business. RRL Exh. 7, at 11. RRL limited partners may vote on an assignment or transfer of control of the company and to change the nature of the business. *Id.*

15. Charles Sampson considered applying for the facility at the suggestion of Joseph Caruso, one of the limited partners. Tr. 94, 95. Mr. Caruso is an attorney who Mr. Sampson consults sometimes. Mr. Caruso pointed out to Mr. Sampson that he stood a good chance of receiving a grant because he is black. Tr. 95. Mr. Sampson was already aware of the availability of the Rockledge FM channel and he knew that minority applicants would be favored. Tr. 92-6. He did not think seriously about applying when he first heard about the channel's availability because he was not familiar with how to apply and it was Mr. Sampson's belief that building a radio station would be expensive and he knew he could not bear that expense. Tr. 93, 96. Mr. Sampson implied in his testimony that Mr. Caruso indicated at his first meeting that he would help him with financing and becoming familiar with the process. Tr. 96. He pointed out that Mr. Caruso expected him to get back to him about applying and he knew he "couldn't pull this operation off" alone. Tr. 96, 97.

16. In a few days he called Mr. Caruso back and said he was interested but he did not know anyone who would invest in the application. Tr. 97, 98. At that time it was Mr. Sampson's intention that investors would be general partners. Tr. 99. Mr. Sampson also testified that he sought other partners, not because he could not have financed the station himself, but because he did not want "to put up the whole entire operation" by himself. Tr. 101. Mr. Sampson also said that despite that conclusion, he did not have any idea how much the station would cost. Tr. 101-02. He was unable to provide an account of how he sought investors and why they turned him down. Tr. 101-03. When questioned about his claim that he organized the proposal, he was unable to supply details about what he believed the cost would be at the time or what he did to interest serious investors. *Id.*

17. Mr. Sampson had earlier established a company called Classic Management Services, Inc. RRL Exh. 2,. He owns 50% of that company which was created to bid on minority contracts at the Kennedy Space Center. Tr. 84. The purpose again was to use his minority status to obtain contracts. *Id.* The company has not made any bids yet but Mr. Sampson hopes that it will because it is lucrative. Tr. 89. Moreover, it involves no effort on Mr. Sampson's part since, as he explained, in order to bid, the company does not have to have any assets. The government provides all the equipment and facilities and the work is performed at the Kennedy Space Center. Tr. 90-91. When asked if he was just a figurehead to obtain the contracts, he answered yes. Tr. 84, 91.

18. When it was suggested to Mr. Sampson that he had no apparent knowledge about the broadcasting business, he concocted a story about his knowledge of broadcasting. He explained that, in 1985, he began a limousine service, which he helped run for about six months. Tr. 82-83. During that time he claimed he provided limousine service to some of the local radio stations which resulted in his sitting around and talking with the stations' DJs. Tr. 92. The only other knowledge Mr. Sampson has about broadcasting was acquired when he was 10 or 11 and he visited a radio station where his sister's boyfriend was a DJ. Tr. 91. He currently maintains and takes care of storing documents at the Kennedy Space Center. Tr. 80-81. He is employed by Bamsey, a Lockhead minority subcontractor. *Id.*

19. Three days after Mr. Caruso suggested to Mr. Sampson that he apply, Mr. Sampson told Mr. Caruso he wanted to form an application. Mr. Caruso said he would get back to him, which he did. Tr. 113. Mr. Caruso said that he and Richard Adams would be limited partners. Tr. 113. Mr. Sampson said he did not know what a limited partner was and he did not know Mr. Adams. Tr. 114. Mr. Caruso then said he would explain the limited partnership form of organization to Mr. Sampson when he came to his office. Tr. 115. When Mr. Sampson went to Mr. Caruso's office, Mr. Caruso showed Mr. Sampson a limited partnership agreement and explained how it differed from a corporation. Tr. 116-17. Mr. Caruso explained that the limited partners would be investors and that, while Mr. Sampson wanted to be an investor, he would be the general partner in order to take advantage of his minority status. Tr. 117, 120. Mr. Sampson said that Mr. Caruso claimed he did not want to be a general partner because he did not want to run the station and leave his law practice. Tr. 119-25. Mr. Sampson suggested the same reason applied to Mr. Adams' decision to become a limited partner; but Mr. Sampson never talked with Mr. Adams, who is, like Mr. Caruso, a lawyer, about his reason for becoming a limited partner and it appears that they never discussed the formation of the applicant together. *Id.* Mr. Sampson, at one point, said that the decisions were made by the three partners together and then he said they were made by two of them. Tr. 128. Mr. Sampson knew nothing about why some of the contributions made by the limited partners were to be loans and some capital contributions. *Id.* No matter how often Mr. Sampson was asked about the financial obligations of the limited partners and how the arrangement was formed, he evaded the question and appeared not to understand how the partnership worked. Tr. 126-28. In fact, Mr. Sampson did not know who prepared the partnership agreement. Tr. 139.

20. Mr. Sampson explained that the partners had never discussed with him how they could keep track of their money or insure that he operated the station properly. Tr. 123. But Mr. Sampson pointed out that the limited partners really were not going to risk anything on constructing and establishing the station. The partnership agreement, he explained, looked to them to provide funds only to obtain the construction permit. Tr. 76-79, 127.

21. Mr. Caruso gave Mr. Sampson a copy of a limited partnership agreement and Mr. Sampson went over the agreement with his wife. Tr. 141. Two days after they discussed it, Mr. Sampson called Mr. Caruso and told him he "would sign the limited partnership agreement." Tr. 142. At the time he had not met with nor talked with Mr. Adams. *Id.* He relied on Mr. Caruso for information about Mr. Adams and Mr. Caruso told Mr. Sampson he would tell Mr. Adams that Mr. Sampson would sign the agreement. Tr. 142-43. When the agreement was actually signed by Messrs Caruso and Sampson, on November 3, 1986, Mr. Adams sent John Rutledge to represent him and, in addition, Mr. Buenzle, RRL's communications counsel, joined them. Tr. 145. At that meeting the application was drafted, finalized and signed. Tr. 155-56. Mr. Adams had signed the partnership agreement on October 31, 1986 and his signed copy was brought to the meeting by Mr. Rutledge. RRL Exh. 7.

22. Mr. Sampson claims he called Mr. Buenzle to retain him some time after October 23, 1986. Apparently, it was Mr. Adams who suggested Mr. Buenzle since Mr. Sampson believes that Mr. Caruso did not know him, although it was Mr. Caruso who gave Mr. Sampson Mr. Buenzle's name. Tr. 140. Mr. Buenzle in turn suggested an engineer to Mr. Sampson. Tr. 138. Mr. Buenzle also asked that engineer, Bernard Segal, to send Mr. Sampson a map showing where the site could be located. Tr. 150. It was Mr. Segal who told Mr. Sampson that he would need a site. Tr. 150. Mr. Sampson then contacted a local realtor who arranged for a site. Tr. 150-52. Mr. Buenzle also prepared comments for RRL to file in Docket No. 86-484, where the Commission is examining the policy on racial, gender, and ethnic preferences. Tr. 181. Mr. Sampson conceded that the comments filed by RRL were not based on information or knowledge he had about Commission policy but that the comments were those suggested by counsel. Tr. 185-86. Mr. Sampson explained that he had no information on which to base comments. Tr. 185-86. RRL, for example, said that discrimination against blacks was more pernicious than discrimination against women. Tr. 183, 185. Mr. Sampson had no information on which to base that belief and it is apparent from his testimony that the whole thing was concocted by his counsel and he simply signed what was prepared without question. *Id.*

23. Mr. Sampson certified both the applicant's financial qualifications and the overall accuracy of the representations in the application. But he did not independently check any information regarding the representations about the applicant's legal qualifications. Tr. 158. For example, Mr. Sampson testified that the applicant would rely on the limited partners to contribute or lend the funds to pursue the legal process to obtain the permit. Tr. 104, 108. Mr. Sampson never verified their ability to provide the funds. He did not see any financial documentation concerning Mr. Caruso or Mr. Adams. He said that he never gave any thought to Mr. Adams' financial commitment to the partnership. Tr. 176, 177. Mr. Sampson also testified that he never gave any thought to media interests that the other partners held and he did not know about Mr. Adams' interests until last year. Tr. 174-75.

24. RRL certified that the limited partners would be insulated from involvement in the operation of the media-related activities of the partnership. RRL Exh. 7, at 9-12. Counsel for RRL prepared the certification and it was prepared without the October 1986 Form 301. Mr. Sampson signed the certification but he was unable to explain what it meant. Tr. 194-95. Mr. Sampson said he again simply agreed to what his counsel prepared and he was unable to recall whether he wrote any of the certificate, or made any suggestion about it. Tr. 206-08. Mr. Caruso was originally designated as RRL's agent, but counsel for RRL, according to Mr. Sampson, believed that Mr. Sampson, not Mr. Caruso, should be RRL's registered agent because Mr. Caruso's designation as agent created an appearance that Mr. Sampson was not in charge. Tr. 166. That way, Mr. Sampson said, RRL would avoid explaining why he was not the agent. *Id.*

25. Mr. Sampson stated twice that the commitment the partnership received from a lending institution for construction and operation costs was received only after the filing of the application. Tr. 105-07, 111-12. But on redirect examination, Mr. Sampson claimed that on the morning of November 3, 1986, the date when he signed the application, he had obtained a bank commitment letter, which he brought to the signing. Tr. 213, 216. Mr. Sampson claimed that he had requested the letter. When asked to explain the inconsistency, he stated as follows:

> Q. . . .[Y]ou testified that you received the bank commitment letter after you filed the application. Did you so testify this morning?
>
> A. Evidently, I misunderstood the question. I was thinking the question was have I received a loan from the bank, a actual loan from the bank, sir.
>
> Q. Did you receive a loan from the bank after you filed the application?
>
> A. I have not received a loan from the bank.
>
> Q. Then why did you say that you had this morning?
>
> A. Because I stated earlier that I had a loan with the bank for the prosecution of the application. I have took out a loan from the bank to cover my percentage of it, the filing of the application. That's what I was thinking about, sir.

Tr. 223-24

26. *Shaw* has three owners, James H. Hummel, who owns, 3,674 shares of Class A common voting stock, Elaine G. Hummel, who owns 3,626 shares of Class A common voting stock, and Wayne L. DiLucente, who owns 7,500 shares of Class B common non-voting stock. Shaw Exh. 3, at 2. Elaine Hummel proposes to work full time, 40 hours per week, at the station as the director of public affairs. Shaw Exh. 2, at 2. She will be responsible for the development and management of the station's local public affairs programming. *Id.* She stated that she would ascertain what public affairs or public service would be necessary. Tr. 322. Ms. Hummel also indicated she would cover "whatever other positions were necessary." Tr. 322. She also indicated she would direct and formulate promotions for the station. Tr. 322-23. Her job will include sales work and sales promotions. Tr. 323. Ms. Hummel could not identify any policies she will set at the station and she explained that she would not supervise

other staff members. Tr. 324, 325, 332. James Hummel said that he would be in charge of programming and that he has already made decisions concerning the amount of public affairs programming which would be broadcast on the station. Tr. 392-93. Ms. Hummel will move to Rockledge. Shaw Exh. 2, at 2. From 1976 to 1978 Ms. Hummel worked as promotions director at station WAXY- FM, Ft. Lauderdale, Florida. *Id.* In 1972, she was promotions director at WFUN-AM, Miami and from 1962 to 1966 and 1969 to 1971 she worked at other broadcast stations in clerical, production, and merchandising positions. *Id.*, at 3. Ms. Hummel is female. *Id.*, at 1.

27. James Hummel proposes to work 40 hours per week or full time as general manager of the station. Shaw Exh. 1, at 2. He will manage and direct the station's day-to-day operations and will have supervisory authority over all employees. *Id.* Mr. Hummel intends to continue hosting his program of "oldies" three to four hours per day. Tr. 350. He stated that his program will either be prerecorded or live. *Id.* He currently directs programs and acts as an on-air personality at WAXY. Shaw Exh. 1, at 2-3. He will move to Rockledge and quit his position as Executive Director of Programming for WAXY-FM, Ft. Lauderdale, Florida. *Id.* Mr. Hummel has been employed at broadcast stations since 1957 in a variety of on-air and managerial positions. Shaw Exh. 1, at 2-4.

28. James Hummel is a director and president of Shaw and Elaine Hummel is a director and secretary/treasurer. Shaw Exh. 3, at 1-2. Shaw did not reveal to the Commission when it certified on November 4, 1986 and filed on November 5, 1986, that it had on November 3, 1986 decided to change the number and class of authorized shares. On that day, the existing stockholders, Elaine and James Hummel, decided to authorize 7500 shares Class A voting stock and 7500 shares Class B non-voting stock. *Id.*, Tr. 356, 359, 361-2, 363. Mr. Hummel testified that Class B shareholders could vote, however, pursuant to state law to protect their interests. Tr. 372. He stated the Class B shareholders would be permitted to vote if the assets were to be sold or the manager became incompetent, or under some circumstances the Class B shareholder could force a sale. Tr. 372. Mr. Hummel said that his counsel had only recently informed him about the Class B stockholders' voting rights. Tr. 372-73.

29. Shaw was incorporated under Florida law on September 20, 1985. Shaw Exh. 3, at 1. As of November 1, 1986, by written consent of the shareholders, Shaw issued 51 shares to James Hummel for $1 per share and 49 shares to Elaine Hummel for $1 per share. DVR Exh. 7, at 1. But, as of November 3, 1986, the shareholders, by written consent, resolved to amend the articles to increase the shares to 15,000 divided into two classes. DVR. Exh. 8. The amendment to the articles was not executed by the Hummels until February 1, 1988. DVR Exh. 9, at 3. Mr. Hummel could not explain the delay, but he suggested that the dating of the documents was "more a function of our local attorneys than anything else." Tr. 361-62, 365-66. He said he thought that "some of this stuff actually happened, I think, a little earlier than the dates might indicate." Tr. 378-79.

30. By consent, in lieu of a meeting of December 21, 1986, the Hummels sold 7500 Class B shares to Mr. DiLucente for $3,675. DVR Exh. 10, at 1. Mr. DiLucente believes the shares were issued in early 1988. Tr. 429. He thinks he paid for the shares but he does not recall how much. Tr. 430. Mr. Hummel said he believed the shares were issued in February 1988. Tr. 388.

31. There is no evident reason why Mr. DiLucente was made a stockholder. Mr. Hummel claims he thought about making Mr. DiLucente a stockholder three to six months after the application was filed. Tr. 360, 364. Mr. Hummel explained that Mr. DiLucente was not needed for financial reasons (Tr. 367) but that giving up some of the potential return also lowered his risk. Tr. 366. Mr. Hummel and Mr. DiLucente had worked together previously and had been equal partners in a business venture to produce a "solid gold show." Tr. 394. Mr. DiLucente was responsible for the equipment, the tape machines, amplifiers, and so forth. *Id.* And Mr. Hummel was the MC, the talent. They sold a four-hour package of music to people who were having reunions, bar mitzvahs, and social occasions that required music. *Id.* The business operated for nine or ten years until Mr. DiLucente moved from South Florida about two years ago. Ms. Hummel said Mr. Di *L* ucente was included because he is a good friend and has a lot of broadcast experience. Tr. 319. He would be helpful on engineering matters, she said. *Id.* Mr. DiLucente said Mr. Hummel contacted him in December 1986 and he saw the offer as the fulfillment of a promise that Mr. Hummel had made to him 10 years before, that if Mr. Hummel were to apply for a station they would be partners. Tr. 421-23. Mr. DiLucente agreed that he and the Hummels work well together and think along similar lines. Tr. 422. Mr. DiLucente consented to join without seeking any information about the proposal. Tr. 424, 426, 428. Mr. DiLucente holds non-voting stock because of the comparative advantage it provides to Mr. and Ms. Hummel to control all voting stock. Tr. 436. Mr. DiLucente pays 49% of Shaw's bills. Tr. 326, 370.

32. *RBA* is a limited partnership with one general partner, Spencer Allen, who owns a 20% equity interest, and four limited partners, Bernard G. Barczak, who owns a 3.5% interest, William Cerny, with a 25.5% interest, George Chopivsky, Jr., with a 25.5%, and George Y. Wheeler, III, with a 25.5% interest. RBA Exh. 1, at 1. Mr. Allen proposes to work full time, 40 hours per week, at the station as its general manager. RBA Exh. 2, at 1. He will be responsible for all aspects of the day-to-day operation of the station. *Id.*, at 1. Mr. Allen retired in 1977 and since then has lived in Cocoa Beach, Florida, a community within the proposed 1 mV/m contour of RBA's proposed station. RBA Exh. 2, at 1.

33. For the last nine years, Mr. Allen has been vice-president and acting-secretary of the Winslow Beach Condo Association. RBA Exh. 2, at 1. From 1985, he has been secretary of the local chapter of the Quarter Century Wireless Association and from 1987 he has been a member of the Arthritis Association. *Id.* He also belongs to the Space Coast Condominium Association and the Indian River Amateur Radio Club. He has belonged to the Retired Officer's Association and the Canaveral Press Club. *Id.* Mr. Allen began his career in broadcasting in 1938 at WGN, Chicago, as a newscaster and writer. RBA Exh. 2, at 2. He worked as a news and editorial director at television stations, and as an anchorperson. *Id.* After he retired in 1977, until 1986, he was a free lance reporter for CBS radio news at the Kennedy Space Center. *Id.*

34. The RBA partnership was organized by the limited partners and one of the limited partners, William C. Cerny, located Mr. Allen. Tr. 535. Mr. Allen is a friend of

Mr. Cerny's father. Tr. 535-36. When Mr. Cerny called Mr. Allen, sometime in mid-October 1985, he explained about limited partnership arrangements and how they work. Tr. 538. Mr. Cerny said that he and three of his friends were forming the partnership; he told him that if he was interested and wanted more information he should talk with Herbert D. Miller at the Washington, D.C. law firm of Koteen and Naftalin. Tr. 538. He was also given the names of the other limited partners. Tr. 659. Mr. Allen was selected by the limited partners because they needed a local general partner for FCC purposes. Tr. 659-60. Mr. Allen called Mr. Miller and at the same time spoke with George Wheeler, another limited partner and a law partner of Mr. Miller. Tr. 539, 541. Mr. Allen was then sent the partnership agreement and a manager's contract. Tr. 541. No material changes were made in the documents. The management contract came to him signed by the limited partners and was an agreement for his employment. Shaw Exh. 7.

35. Mr. Allen said the partnership agreement already had the shares of ownership determined when he received it. Tr. 550. The limited partners determined among themselves what the ownership shares would be and Mr. Allen agreed to the share that had been allocated to him because he believed it was fair. Tr. 548, 551. On the day Mr. Allen signed the application, on November 4, 1986, he decided to become a general partner. Tr. 661. Mr. Allen is unfamiliar with the limited partners and, when he agreed to become the general partner, had only met Mr. Wheeler. Tr. 661, 663-64. He has no idea what their plans are for the station. Tr. 663. All aspects of the proposal, the engineering, application, and selection of counsel were all done without his participation. Tr. 665, 666-67, 675. Mr. Allen was not asked to provide any financial information. Tr. 675-76.

36. In fact, limited partner George Wheeler selected the limited partnership form of organization, and he also proposed registering the partnership in Maryland. Tr. 672, 673. Mr. Wheeler and his partners have joined in four other applications and organized them in the same way. They are all organized under the same basic limited partnership agreement drafted by a Maryland law firm, they are all registered in Maryland at Mr. Wheeler's suggestion, and they all have Mr. Wheeler's law partner, Herbert Miller, as counsel. Tr. 464-5. Mr. Wheeler recommended the engineer used by all but one of the partnerships. Tr. 467-68. RBA received its loan letter from Sovran/D.C. National Bank, Washington, D.C., where another limited partner, George Chopivsky, is on the loan committee. Tr. 473. The limited partners have operated their other partnerships just like RBA. In each case they have had employment agreements with the general partner. Tr. 494.

37. While Mr. Allen testified that he has made capital contributions to the partnership, under the partnership agreement he is entitled to a consulting fee and that fee has equaled the partnership contributions he has made thus far. Tr. 682, 685-86. Mr. Allen said he has been paid about $3,000 for keeping the books and paying the bills. Tr. 687-88. So far he has been involved in 20 transactions. *Id.* He also sends statements about the finances each month to the other partners. Tr. 688-89. Mr. Allen also decides when he is due a fee. Tr. 685-86. He is entitled to $7,500 in fees under the partnership agreement. RBA Exh. 1, Attachment A, at 18. The partnership agreement provides that the principal office of the RBA partnership is in Potomac, Maryland. *Id.*, at 2. Contributions of capital are to be the pro rata share of $50,000. *Id.*, at 4. Additional funds are to be borrowed from a lending institution, if possible, or from the partners, pro rata. *Id.*, at 5-6.

38. The RBA limited partnership agreement does insulate the limited partners from the activities listed in the instructions to Form 301, Section II, A. *Id.*, at 13-17.

39. *Orion* is the business name for the individual applicant, Michael H. Kahn. Orion Exh. 1. Mr. Kahn proposes to work full time, 40 hours per week, as the general manager of the station. Orion Exh. 3, at 1. He will oversee the station on a day-to-day basis and develop and establish all of the station's operating policies. *Id.* Mr. Kahn will give up the full-time practice of law. *Id.* He will spend 10 hours per week on his practice and he will hire a full-time station manager for the station. Tr. 732. Because he has no broadcast experience, the person he hires will help him make decisions. Tr. 733. Orion proposes less than five full-time employees, which includes the general manager and the station manager. Tr. 735-36. Mr. Kahn said he looks "to have more or less an input in all the decisions made at the station . . " Tr. 735.

40. Mr. Kahn practices law with Lisa Kahn, his spouse. Orion Exh. 3; Tr. 724. In his written testimony, he stated that he will give up the full-time practice of law to devote himself full time to the position of general manager. Orion Exh. 3. He said that his wife will assume his practice and will hire an associate, if necessary. *Id.* He will, however, be available to the firm for ten hours per week. *Id.* Mr. Kahn was examined about his promise. He said that his spouse was engaged in a different area of law. Tr. 725. He could not estimate his billable hours. Tr. 725-26. He has not told most of his clients that he may cease or curtail his legal work; this, in part, has been because he believes they will leave the firm. Tr. 728. He continues to take new clients. If he is awarded the facility, he will be available to assist his major clients on any corporate matters of legal import or business import or assist their successor counsel. Tr. 728-29. He stated after that he would give up the practice full time if he needed to do so. Tr. 771. Mr. Kahn said he did not enjoy the practice of law. Tr. 730. However, since 1977, he has practiced law in two communities in Florida. Tr. 723.

41. Mr. Kahn lives in Melbourne, Florida, which he believes is within the 1 mV/m contour of the proposed station. Orion Exh. 4, at 1; Tr. 766-68. He said he reached the conclusion that he lives within the 1 mV/m contour by looking at maps. Tr. 764. When Orion's coverage map was shown to him, he conceded that the area known as Melbourne was outside the applicant's proposed service area but, he said, he believed that his house was within the service area. Tr. 765-68. He determined that his house was within the service area from a "rough approximation" of the coverage area which was given to him by Orion's consulting engineer. Mr. Kahn testified that he had never seen a map which actually showed his residence within the 1 mV/m contour. Tr. 782. He has lived there since 1981. He has previously lived in the same county as Rockledge, Brevard, during the period 1963 to 1977. Kahn Exh. 4, at 1; Tr. 770. Mr. Kahn has been involved in church, political and civic activities in the service area. Orion Exh. 4, at 1.

42. *DVR* is a general partnership with three equal general partners, Douglas Leo Peralta, Valree Ann Peralta, and Robert Thomas Rowland, Jr., all of whom intend to work at the proposed station. DVR Exh. 1, at 1. Douglas

Peralta, who is a one-third general partner, proposes to work at the station as the general manager and general sales manager for at least 40 hours per week. DVR Exh. 2, at 1. He will supervise the station's sales force and will have overall responsibility for station policies in areas not assigned to other partners. *Id.* Mr. Peralta believes he would do some sales work on regional and national accounts. Tr. 866. Mr. Peralta will move to Rockledge and he now claims that he will sever all ties with WITS and WCAC-FM, Sebring, Florida, where he is now employed. DVR Exh. 2, at 1. He has worked at radio broadcast stations since 1979. *Id.*, at 2. His positions have included sales and managing; he currently is the general manager and general sales manager of WITS and WCAC-FM, Sebring, Florida. *Id.*, at 2.

43. Valree Ann Peralta, who is a one-third partner, proposes to work full time, 40 hours per week, as business manager. DVR Exh. 3, at 1. She will direct the station's financial planning and other day-to-day financial matters. *Id.* At the Sebring stations where Ms. Peralta works she takes care of the accounts receivable, traffic work, bookkeeping, and general duties of a business manager. Tr. 859-60. Mr. Peralta believes her duties at the Rockledge facility would be the same. She would be in charge of the financial end of the station. Tr. 860. Ms. Peralta stated in her testimony that she will move to Rockledge. DVR Exh. 3, at 1. She is female and has worked full time and part-time at broadcast stations since 1973. *Id.*, at 1-2. She currently is the business manager, public service director, operations director and announcer at WITS and WCAC-FM, Sebring, Florida. *Id.*, at 1.

44. Robert T. Rowland, Jr., who is a one-third general partner, proposes to work full time, 40 hours per week, as program director. DVR Exh. 4, at 1. He will supervise the station's production and programming staff and its program operations, including news and public service programming and will supervise engineering. *Id.* He states in his testimony that he will move to Rockledge and he will sever his current ties with the Sebring stations. *Id.* Mr. Rowland works full time at WITS and WCAC-FM, Sebring, Florida as program director and announcer. *Id.* He has worked full time at broadcast stations since 1985. *Id.* at 1-2. Before that he worked part-time at other stations from 1979 to 1985. *Id.* at 2.

45. DVR did not execute its partnership agreement until March 13, 1988 and it was notarized on March 14, 1988. DVR Exh. 1, at 7; Tr. 841. The Agreement states that the formal 1988 agreement is a ratification of an oral agreement that had been in effect "since prior to November 1986." *Id.*, at 6. The parties stated in the agreement that they had agreed orally that each partner would have an equal, one-third sharing of profits, losses and financing. *Id.* Ms. Peralta claims the existence of the oral partnership is evident because the same partners applied for a new AM station at Port St. Lucie, Florida in 1983, there is a close family relationship among the partners, and since December 1986 the partners have held the same management responsibilities at WITS and WCAC-FM, Sebring, Florida. DVR Exh. 1, at 2. The application for Port St. Lucie was dismissed but the partnership was an oral one while the application was pending. Tr. 809.

46. Ms. Peralta keeps the records for the partnership and the other partners review them. Tr. 813. Ms. Peralta said she was not familiar with the details of Florida partnership law. Tr. 814. But the partners had the partnership contract or agreement explained to them point by point by their counsel. Tr. 857-58. Although DVR claims it was an established oral partnership from the outset, the partners did not obtain a bank letter until July 1987. Tr. 818. The Peraltas did talk to the bank in October 1986. Tr. 862. Before the bank meeting the partners made a budget. Tr. 822-23, 892. DVR concedes, however, that no written documentation existed at the time the parties certified that they were financially qualified. Tr. 833. In addition, it appears that DVR failed to report changes in media interests and associations. Tr. 836-37. Ms. Peralta handled preparation of the proposal with some help from Mr. Rowland. Tr. 865-66, 892-93, 817. Ms. Peralta has handled all payments made by the partnership. Tr. 822. There are no partnership books. Tr. 812.

Auxiliary Power and Comparative Coverage

47. Each applicant has proposed the use of auxiliary power generating equipment to insure continuity of operations in the event of power failure. RRL Exh. 6; Shaw Exh. 4; RBA Exh. 4; Orion Exh. 5; and DVR Exh. 5. The parties stipulated that there are no significant differences in their proposed coverage. Jt. Stipulation 1; Tr. 47.

CONCLUSIONS

Proposed Participation In Station Operation By Owners

48. *RRL* proposes that its sole general partner, Charles L. Sampson, who owns a 25% equitable share of the partnership, will work full time, forty hours per week, as the station's general manager. RRL maintains that Mr. Sampson will exercise complete control of the licensee and that the two RRL limited partners, Richard Adams and Joseph Caruso, will be insulated from the management and operation of the station. Moreover, RRL points out in support of its claim, that its limited partnership agreement provides that if any provision is contrary to the insulation standards set by the Commission, the provisions will be modified to comply. RRL Exh. 7, at 12.

49. RRL states that it patterned its partnership agreement after the Commission's statement in *Ownership Attribution*, 58 Radio Reg. (P&F) 2d 604, 620-21 n. 72. There, the Commission stated that limited partners may make loans to the partnership and they may vote on the sale, exchange, lease, mortgage, pledge or other transfer of all or substantially all of the assets of the business other than in the ordinary course of the business and still be considered insulated. The Commission also held that limited partners could vote on the change in the nature of the business and petition the Commission for permission to transfer the license. *Id.* The Commission permits limited partners to have this level of control as long as they do not control or participate in the applicant's decision making process regarding the partnership's media interests. When the partnership is not operating an ongoing business, other factors are considered to determine whether there is a basis for inferring that the limited partners will exercise influence or control over the entity, despite claims that they will be insulated from decision making. *Victory Media*, 3 F.C.C. Rcd 2073, 2075 (1988).

50. RRL has never operated a broadcast station. Therefore, it is not possible to test how the partnership manages its affairs when operating a broadcast station. The opposing parties argue that the method by which RRL was organized, the actions it has taken to pursue its application, and the partnership agreement itself lead to the

conclusion that general partner Charles Sampson will not exercise complete control over the partnership's business. Mr. Sampson maintains that he will control the partnership without interference or the assistance of the limited partners. The opposing parties urge that Mr. Sampson is not a creditable witness on this account and that his characterization of his authority should not be believed.[1]

51. The RRL partnership was organized by Joseph Caruso, a limited partner. It was Mr. Caruso who suggested to Charles Sampson that he join him and Richard Adams in applying for the Rockledge frequency. It was also Mr. Caruso's idea that Mr. Sampson, who is black, would be the only general partner and that he and Mr. Adams would be the limited partners. Mr. Sampson claimed that he had earlier heard about the frequency but that he scoffed at the idea of applying because of the money it would take to apply. He said that the next time the Rockledge frequency was mentioned was in a conversation with Mr. Caruso. Mr. Caruso told Mr. Sampson that he would be a good candidate for the facility because he is black and that that alone would strengthen his proposal.

52. Mr. Sampson tried to convince the Commission that Mr. Caruso had not sought him out to serve as the minority general partner for his planned application. He said he went to see Mr. Caruso originally because Mr. Caruso was his sometime lawyer. There is no evidence, however, that establishes that Mr. Caruso was ever Mr. Sampson's lawyer and there is some evidence that he was not. Shortly before this proposal was filed, Mr. Sampson had occasion to establish two companies, one operates a local limousine service and the other is a corporate shell. Mr. Caruso did not organize those companies for Mr. Sampson; he sought other counsel. There appears to be no reason why Mr. Sampson would have contacted Mr. Caruso for legal advice. Mr. Sampson does not operate the limousine service and in his day-to-day job, he files and maintains documents for a minority subcontractor at the Kennedy Space Center.

53. Mr. Sampson also attempted to convince the Commission that Mr. Caruso had not sought him out by maintaining that he already knew about the available frequency when Mr. Caruso contacted him and by claiming that he intended to organize an applicant without Mr. Caruso. The explanation provided by Mr. Sampson is not credible. Mr. Sampson said he sought other partners to join him but he could not interest anyone. At the same time he said he did not know how much the proposal would cost. When he was ostensibly organizing his proposal, he believed it would cost a million dollars. He did not know what a limited partner was, or how to make a proposal to the Commission. He had difficulty even remembering who he talked with about joining him. Depending on which transcript page is read, Mr. Sampson said he could finance the project and he could not. The fact is, he did not, and Mr. Caruso and Mr. Adams did.

54. Mr. Caruso gave Mr. Sampson the partnership agreement and on the day Mr. Sampson decided to become the general partner, he signed it and signed the application. Mr. Sampson had not met or talked with Richard Adams, the other limited partner. Mr. Adams' participation was handled by Mr. Caruso. The day Mr. Sampson signed the partnership agreement in Mr. Caruso's office, the applicant's Washington counsel was present and he produced the completed application. The evidence shows that Mr. Sampson heard about the partnership's communications counsel from Mr. Caruso and the engineer was selected and instructed by that lawyer, Robert Buenzle. About the only thing Mr. Sampson did was follow the engineer's instructions about where the antenna site should be located.

55. Mr. Sampson also claims that he obtained a letter from a bank which purportedly promises to finance the construction and operation of the station. He was twice asked when the letter was obtained; each time he said some time after the application was filed. When his counsel asked him the same question on redirect, he said he obtained the letter on the way to the meeting at which he signed the partnership agreement, on November 3, 1986. On recross he said he had confused the bank commitment letter with an actual loan he took out from the bank. He then said he had not taken out a loan from the bank after the application was filed. Then, when reminded that during the morning hearing session he said he had, he stated he had borrowed from the bank to cover his share of filing the application. There is no question, however, that Mr. Sampson was not asked about a personal loan but that he was clearly asked about the applicant's financing letter. Mr. Sampson's testimony about how he obtained financing is incomprehensible and probably untrue in all its versions. It is further evidence that he was not involved in establishing the applicant.

56. Mr. Sampson admits that he was not consulted about the partnership agreement, the partnership shares, or the amount of the partnership contributions. In fact, he did not know that the most critical part of the partnership agreement, that which provides for the amount of money which the limited partners are bound to contribute or lend, had not been completed when he signed the agreement. The names of the partners had not been entered where called for in those provisions, nor the amounts they would contribute. Mr. Sampson said he learned about the incomplete document as he was being prepared for the hearing during the weekend before it began, more than two years after he signed the agreement.

57. When Mr. Sampson was questioned about the partnership agreement he was generally evasive. He did not know who prepared it and he did not know how it worked. Mr. Sampson said that RRL depends on the limited partners to finance the establishment of its proposal in the regulatory process. But he has never examined whether the limited partners can meet that requirement. Mr. Sampson does not know anything about the financial ability of either Mr. Caruso or Mr. Adams. Nevertheless, Mr. Sampson certified the applicant's finances. He also submitted and signed a statement prepared by counsel that the limited partners were insulated from the business of the partnership, although he had no reason for agreeing with the prepared statement.

58. The opposing parties questioned Mr. Sampson about a provision in RRL's agreement which gives the limited partners the right to call their loans if the station's assets exceed the combined capital accounts. Mr. Sampson had no understanding of the loan provisions; he believed that the limited partners could request repayment only if RRL had profits. Although the loan repayment provision permits the limited partners to control when the business repays the loan without the agreement of the general partner, he knew nothing about it.

59. RRL defends its partnership agreement's loan provisions as being an acceptable form of control since the Commission permits limited partners to lend the partner-

ship money. However, that is not where RRL's agreement fails; it fails to insulate the general partner from the limited partners' control because the repayment terms are left to the judgment of the limited partners without consulting the general partner. While it cannot be determined what impact the provision will have on the day-to-day operation of the station, it is apparent it could be substantial since the limited partners are committed to lend $160,000. The general partners' plans for the development and operation of the station could be interfered with at any time, when the limited partners request their money. Ordinarily, the general partner knows when he or she will have to repay money and he or she can plan for that requirement, or if not provided for in the loan, at least, the general partner is given authority to negotiate the payment. RRL's plan excludes the general partner.

60. Mr. Sampson's testimony proved unreliable in several other respects and overall his untruthful testimony leads to the conclusion that he cannot be counted on to tell the truth about his role in the partnership. In order to establish that he was capable of managerial work, Mr. Sampson said that he owned 50% of Classic Management Services, Inc. He represented that he was involved in starting the business and was "extremely involved" in its operation when the business was formed in 1985. RRL Exh. 2. He then said that he no longer participates in its day-to-day management and, therefore, it would not interfere with his commitment to work at the station. Actually, Classic Management Services is a corporate shell which has never had any business. Mr. Sampson established it to obtain minority contracts at the Kennedy Space Center. Mr. Sampson, according to his testimony, does filing and the maintaining of documents at the Kennedy Space Center for a minority subcontractor. Sometimes he drives a limousine.

61. Mr. Sampson said that when Mr. Caruso told him about this proposal, he did not know what a limited partner was but he was fully aware about how important his participation would be to receiving a preference because of his minority status. Despite RRL's attempt to claim that Mr. Sampson has management experience, there is no evidence that he was chosen for any business reason. He was selected, as he realized, in order that RRL might receive a grant based on his minority status and his control over the partnership. Thus far, the evidence demonstrates that Mr. Sampson has gone along with whatever he has been told to do. His testimony about his role is unreliable; that which is reliable shows that he has had little of substance to do with RRL's proposal. The partnership agreement, moreover, does not fully insulate the limited partners from the day-to-day business of the applicant.[2] At most RRL is entitled to integration credit for only Mr. Sampson's 25% equity, if it could be assumed that he will exercise any control. His untruthful testimony leaves that in doubt and for that reason RRL will receive no integration credit.

62. *Shaw* proposes that its two voting stockholders will manage the Rockledge facility full time. James Hummel, who owns 3,674 shares would be the general manager and his spouse, Elaine Hummel, who owns 3,626 shares, would be the director of public affairs. Their combined shares represent 51% of the applicant's equity and purportedly all of its control. Mr. Hummel will direct the day-to-day activities of the station and, in addition, he will host an on-air program of recorded "oldies." The opposing applicants argue that Mr. Hummel's promise to become manager should not be fully attributed because he will also spend a significant part of each day broadcasting. Shaw responds to these arguments by pointing out that Mr. Hummel in his current broadcast station position works on-the-air and is also executive director of programming at WAXY-FM, Fort Lauderdale. Mr. Hummel said that he would do the program either prerecorded or live. He explained that when he does a similar program for another station, WCXL, Vero Beach, Florida, each week, he records only the voice tracks which takes about 30 to 40 minutes. Tr. 351. The test, of course, is whether participating owners will occupy positions in which they will exercise policy functions and play an important role in management. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 395 (1965). In addition, greater weight is given to persons who will devote substantial amounts of time on a daily basis. *Id.* There is no doubt that Mr. Hummel has promised to spend substantial time at the station and manage its affairs. His longtime experience in radio in a management position makes his promise creditable; he is entitled to full credit for his proposal to manage the Rockledge facility. Mr. Hummel's proposal is enhanced by his promise to move to Rockledge and his 32 years of broadcast experience, including a substantial number of years as a manager.

63. Elaine Hummel proposes to work full time, 40 hours per week, as director of public affairs. She stated in her written testimony that she would be responsible for the development and management of the station's local public affairs. When she was asked to be more specific, she said that she would also direct and formulate station promotions and participate in sales of advertising. She initially said she would determine what public service programming would be necessary.

64. The opposing parties have argued that Ms. Hummel's written promise to determine the public service programming is no more than a paper proposal because Mr. Hummel claimed he had already decided how much public affairs programming would be broadcast by the station. Moreover, they point out that Mr. Hummel said he would be in charge of programming. Mr. Hummel explained that the station would broadcast a public service announcement every hour and public service programming would occupy 2-3 hours per week in the schedule. Tr. 393. The opponents urge that Ms. Hummel's promise is further undermined by her inability to identify which policies she would set at the station. When Ms. Hummel was asked about that she said she did not know what policies she would set at the station and she stated that no employees would be under her supervision. She conceded the station would have less than 5 full-time employees and some part-time employees.

65. Ms. Hummel's promise to act as the public affairs director is not entitled to be credited as a position that will involve policy functions and it does not appear that there is a likelihood that she will play an important role in management. In light of the Hummel's testimony, it is more than likely that Mr. Hummel will make programming decisions and that Ms. Hummel will, as she testified, sell advertising and promote the station, functions which are not part of the public affairs programming outlined by Mr. Hummel. Ms. Hummel's broadcast experience is in keeping with her testimony about her role. She has not worked in broadcasting for over ten years but when she did, during 1976-1978, and 1962-1972, she worked in clerical and merchandising or promotion positions. It is

not surprising that she sees herself as continuing that work at the Rockledge station. Shaw's claim for crediting her integration proposal will not be weighed.

66. The opposing parties also argue that Shaw's non-voting stockholder, Wayne L. DiLucente, should be viewed as a person who will exercise control along with the Hummels since there appears to be no legitimate business reason for his non-voting status except to exclude his interest for integration purposes. Mr. DiLucente owns 7500 shares of Class B non-voting stock in Shaw, which represent 49% of the equity. Mr. DiLucente testified that there was no justification for his owning non-voting stock except to enhance the applicant's comparative proposal. While there is no evidence that he has voted on corporate matters, there have been few decisions which have been put to a vote.

67. Mr. Hummel conceded that the written corporate documents were formed by local attorneys and did not really reflect how decisions were made. For example, Mr. DiLucente apparently did not own his shares when the application and corporate documents were prepared. But it was evident to him that he would be a party to the application. Mr. DiLucente and Mr. Hummel operated a business together in which Mr. Hummel did announcing and Mr. DiLucente provided the technical or engineering work; it was an equal partnership that provided music entertainment for social occasions. During the time they operated that business together, which only ended two years ago because Mr. DiLucente moved away, Mr. Hummel promised Mr. DiLucente that if he applied for a station they would be partners. The offer, when actually made, was not made for financial reasons. Mr. Hummel said that the applicant did not need Mr. DiLucente's money. In fact, Mr. DiLucente purchased his 49% share for less than par value per share. Tr. 395. The Hummels concede that there were advantages to having Mr. DiLucente join them, however. Ms. hummel pointed out that they could use his engineering knowledge and Mr. Hummel thought Mr. DiLucente's broadcast experience would be helpful.

68. The evidence indicates that the Hummels decided from the outset the Mr. DiLucente would join them but it appears that when they organized the corporation they did not conceive of Mr. DiLucente holding non-voting stock. Apparently there was no non-voting stock until the day before the application was filed, according to the corporate documents which were made up after the fact. When the application was filed no mention was made of Shaw's two-tier stock. In addition, Mr. Hummel's account of exactly when Mr. DiLucente joined the corporation is inconsistent with the documents prepared by local counsel. Mr. DiLucente did not even know if he had paid for his stock. This corporation is not General Motors; it is just three friends and former business associates joining together to apply for a broadcast license. In order to put their best foot forward, the lawyers created two classes of stock, but that decision was made solely to achieve high integration credit and bears no relationship to how the parties perceive their close relationship in this business venture. As a practical matter, Mr. DiLucente's interest and control is no different from the Hummels.

69. Shaw is entitled to full credit for Mr. Hummel's integration promise. He owns 26% of the stock. No additional credit is warranted.

70. *RBA* is a limited partnership with one general partner, Spencer Allen. Mr. Allen proposes to work full time, 40 hours per week, as the general manager of the Rockledge facility. He will be responsible for all aspects of the day-to-day operation of the station. Mr. Allen lives in Cocoa Beach, Florida which is within RBA's proposed primary contour. He has lived there since 1979; during that time he has belonged to a number of local community organizations. Mr. Allen worked at broadcast stations from 1938 to 1977, when he retired. After retiring he worked until 1986 as a free lance reporter for CBS radio news about matters involving the Kennedy Space Center.

71. Mr. Allen's activities on behalf of the partnership have been limited; he has only kept track of the partnership bank account, paid the bills, and reported to the limited partners about the funds spent and needed. The limited partners, George Wheeler, George Chopivsky, Bernard Barczak, and William Cerny, organized the partnership and determined how it would operate. They decided what interests the parties would have, selected the local general partner, and directed preparation of the application, which was prepared by a law partner of Mr. Wheeler's. The financing was obtained from a Washington, D. C. bank where Mr. Chopivsky is on the loan committee. RBA's limited partners located Mr. Allen through Mr. Cerny's father, who is a friend of Mr. Allen. Mr. Allen is paid for maintaining the partnership records and he has an employment agreement to manage the station.

72. RBA concedes that the limited partners have made all material decisions about the proposal. They claim, however, that because these decisions were all made by them before Mr. Allen decided to become the general partner, their actions do not evidence that Mr. Allen will not operate the station and direct the partnership. Mr. Allen claims he did not decide to become the general partner until November 4, 1986, the day before the application was filed, when he came to Washington, D.C. to meet with RBA's counsel and sign the partnership and management agreements and the Form 301 application. It is not plausible that the limited partners would have waited until November 4, 1986 for Mr. Allen to make up his mind, since without him the proposal would have had no chance of success. Mr. Cerny contacted Mr. Allen in mid-October 1986 and immediately sent Mr. Allen the partnership documents, which Mr. Allen had his local counsel review. A more accurate assessment of Mr. Allen's decision process would be merely to conclude that he technically became the general partner the day before the application was filed. RBA's limited partners were so careful in calculating every aspect of their proposal, it does not follow that they would not have wanted a decision from Mr. Allen substantially before the application was due in order not to place their plans at risk. RBA's limited partners controlled who would be general partner and when he would be asked to join the partnership. The fact that his formal signing of the agreements came after all substantive decisions had been made only seems to point up their absolute control from the outset.

73. RBA urges that the significant participation of the limited partners in every aspect of its proposal and no participation by the general partner will now reverse itself because the limited partnership agreement excludes the limited partners from participating in the media related business of the partnership. The opposing parties argue that RBA's partnership agreement effectively permits the

limited partners to determine whether the partnership agreement will continue or end by their control over lending and borrowing. But that does not defeat RBA's claim of insulation; generally that could be said of any partnership. If the partners decide not to contribute their capital for their equity or to fulfill their obligations to provide loans, the partnership may cease to exist. In this partnership, however, the limited partners did obtain a letter from a Washington bank which exhibits a good faith intention to build the facility. It is also urged by DVR that the employment agreement between Mr. Allen and the limited partners exhibits control by the limited partners. That agreement (Shaw Exh. 7) provides that Mr.Allen will be the manager and that after a grant the limited partners will enter into an employment agreement with him which will provide for his salary and set forth his duties. That employment contract must, according to the agreement, pay him a salary equal to that earned by other managers of similar stations in the area and cannot limit the authority he has as general partner. There is no reason to conclude from the agreements between RBA's limited partners and general partner that they will not be insulated from each other.

74. The opposing parties urge that Mr. Allen will probably not manage the station. They point out that he is in his mid- seventies, has been retired for ten years, and in fifty years of working in broadcasting he never managed or even attempted to own a broadcast station. When Mr. Allen was questioned about his current interest and asked to explain why he did not pursue it before now, he said he could not afford it previously. Tr. 653-54. But that seems more pretext than reality since he is only contributing a part of $10,000 to this proposal and he worked as an anchorperson for a network owned news program. RBA's response is that Ronald Regan was President at 76. But that begs the point since Ronald Reagan was not retired for 10 years before his 76th birthday; it was also not the case, as it is with Mr. Allen, that he was recruited by a group of limited partners from Washington, D.C. and Rhode Island that he had never met. Mr. Allen testified that he never thought about managing during his 50 years of broadcast employment because his interest is journalism. Tr. 656. When he was asked whether this radio station would be committed to journalism, he said he could not say. *Id.* Mr. Allen's most straight forward response rings true, he said he was told he was chosen to the be general partner because he lived near Rockledge. Tr. 659-60. He also believes he was selected by the limited partners because they could trust him.

75. DVR points out that Mr. Allen has no stake in the outcome of this proceeding. He is entitled to pay himself a fee from the partnership funds in compensation for his general partnership activities. So far Mr. Allen has undertaken about 20 transactions (mostly related to the payment of bills and collection of funds) and he has paid himself a salary equal to his obligation to contribute money to the partnership. RBA responds to these facts by pointing out that eventually Mr. Allen will have to contribute a minimum of three thousand dollars of his own money. But that claim does not support the represented that Mr. Allen will ultimately control and manage the partnership. Thus far he has only carried out simple bookkeeping activities.

76. DVR also maintains that George Wheeler's partnership in the applicant's law firm and his role in organizing the partnership -- among others -- indicates that he is not going to be insulated from the activities of the applicant. RBA claims that Mr. Wheeler does not have access to the applicant's files and that he is not involved in the current decisions being made by counsel. That may be the case now but when the application was being prepared and the partnership formed, there obviously was no separation; in fact, Mr. Wheeler selected Mr. Miller, his business partner to act as counsel. In any event, the agreements with their very specific and, in some respects unique, provisions did not just happen. As Mr. Wheeler's testimony indicates, the limited partners had very definite views on how the partnership should function, who should be the general partner, and how the application should be prepared. Those views were followed here and applied in other markets where the partners have filed other proposals. Since the partnership was organized and the application prepared and filed there have not been any decisions to make according to Mr. Allen. RBA's claim of insulation is just plain implausible. "These functions by the limited partners go beyond the permissible functions of limited partners and are sufficient . . . to support the conclusion that the general partner[] would not be the *only* active, controlling owner[]." *Coast TV*, FCC 89-47, released February 23, 1989, at ¶ 9 (emphasis in original). Mr. Allen is entitled to receive credit for his 20% interest, despite the fact that his situation is not like former broadcaster and President, Ronald Reagan.

77. *Orion* is the business name for Michael Kahn, who has applied as an individual. Mr. Kahn proposes to work full time, 40 hours per week, as the general manager. He claims in his written testimony that he will establish all the station's operating policies and oversee the station from day-to-day. The opposing parties urge, however, that Mr. Kahn's testimony demonstrates that his promise to leave the practice of law is uncertain and that he may not be present or manage the station on a day-to-day basis.

78. Mr. Kahn was equivocal about leaving his law practice. Sometimes when questioned he said he would give it up. At other times he denied knowing even how much time he spent in his practice. He also said his wife would take over his practice; although in answer to other questions, he explained that, while they are in the same firm, they actually practice in separate areas of the law and she would not be equipped to take over his clients. He said he would, therefore, have to continue providing advice to his major corporate clients. While this testimony shows Mr. Kahn to be undecided about how he will manage his existing legal business, he admitted from the outset that it would take 10 hours a week of his time. The evidence does not show that it would take more or less time than that. There is no reason to conclude that he could not spend 40 hours per week at the station.

79. Mr. Kahn also indicated that because he is unfamiliar with operating a broadcast station (although he does represent broadcast stations), he intends to hire a station manager as one of the station's employees. Mr. Kahn indicated that he would look to this person to help him make decisions. The evidence does not demonstrate that Mr. Kahn will not make decisions or that he will delegate to the professional station manager his general manager's role. While this proposal appears top heavy and unrealistic for a station that proposes less than five employees, it cannot be said that Mr. Kahn will not be responsible for the management of the station. Moreover, it is Mr. Kahn's realization that he is inexperienced and his provision for assistance that make his plan realistic. Even though it

might be expected that policy initiatives may come from the station manager, there is every incentive for Mr. Kahn, as owner, to reach the ultimate judgment. He is entitled to the 100% integration credit that he seeks.

80. Mr. Kahn lives in Melbourne, Florida. He claims that he lives within the primary service area of the proposed station. But the coverage map, included with his application, shows Melbourne, Florida to be substantially outside the 1 mV/m contour. He asserts, nevertheless, that his house is within the contour; it is a conclusion he reached from a "rough approximation" of his proposed coverage which was provided to him by his consulting engineer. Mr. Kahn has never seen a map which clearly marked his street as coming within the 1 mV/m contour. Without some exact evidence showing that his residence is within the proposed primary contour, it must be concluded on the basis of the only map submitted in this case with Orion's coverage that Mr. Kahn does not live within the service area. He does not propose to move within the service area. The burden to demonstrate local residence is on the applicant. Mr. Kahn claims both Melbourne and Brevard County activities. Only those which are county-wide would come within the service area; they include membership in or contributions to two charitable organizations, a symphony association, and a beautification organization. He has no broadcast experience.

81. *DVR* is a general partnership with three equal general partners, Douglas Leo Peralta, Valree Ann Peralta, and Robert Thomas Rowland, Jr. Douglas Peralta promises to work full time, 40 hours per week, at the proposed station as general manager and general sales manager. He will have responsibility for station policies in the areas not assigned to other partners, supervise the station's sales force and sell time to regional and national advertisers. Mr. Peralta currently occupies these same positions at WITS and WCAC, Sebring, Florida. He has worked at radio broadcast stations since 1979. He has promised to quit his Sebring position and move to Rockledge.

82. Douglas Peralta's spouse, Valree Ann Peralta, promises to work full time, 40 hours per week, at the Rockledge facility as business manager. She will direct the station's financial planning as well as other day-to-day financial matters. Ms. Peralta also works at the Sebring stations and she states that the duties she performs there are the same as those she will perform at the Rockledge facility. At WITS and WCAC, Sebring, Ms. Peralta maintains the records for and collects the accounts receivable, performs the traffic, bookkeeping and business manager duties. In Sebring she is the business manager, public service director, operations director and announcer. Ms. Peralta has worked at broadcast stations since 1979, during some of this time she only worked part-time. She will move to Rockledge and sever her ties to WITS and WCAC. She is entitled to a female preference.

83. Robert Rowland, who is Ms. Peralta's brother, proposes to work full time, 40 hours per week, as program director. In that position he will supervise the station's production and programming staff, as well as program operations. His position will include supervision of engineering. Currently, Mr. Rowland works at the Sebring stations, which are owned by his and Ms. Peralta's parents, as program director and announcer. He promises to quit that job and move to Rockledge. Mr. Rowland began working in broadcasting on a full-time basis in 1985; before that, from 1979, he worked part-time in broadcasting.

84. The opposing parties argue that DVR's ownership structure was too tenuous at the B cutoff date to be relied on for crediting its integration proposal. They point out that DVR did not have a partnership agreement until mid-March 1988. DVR argues that the partners had an oral agreement in November 1986 in which the partners had agreed to share equally in profits, losses and financing. The partners, in order to substantiate their oral agreement, point to several factors they claim establish that there was an oral agreement: They point out that the same three family members applied for a station, in 1983, at Port St. Lucie, Florida and that the positions they propose to fill in Rockledge they have held in Sebring since December 1986, when the stations were acquired. It is not known, however, whether the Port St. Lucie partnership actually reflects the arrangement here since it too was oral and the application was dismissed. There are also indications that the partnership may not have been firmly established at the B cut-off. For example, the partners did not have a bank letter until July 1987, substantially after the application was filed, on November 5, 1986. In addition, they have kept no partnership records of any kind including financial records. DVR concedes that no financial documentation existed at the time the application was filed. But DVR points out that the testimony indicates that the Peraltas talked with the bank in October 1986 that ultimately issued the letter and that they prepared a budget before they went to the bank.

85. The parties in this proceeding had to explain their legal organization and, in some cases, submit documentation of that organization on March 22, 1988. DVR did not sign a partnership agreement until March 14, 1988, about a week before the statements were due. This case was designated for hearing on December 27, 1987 and amendments as a matter of right could not have been filed later than January 1986. The prehearing conference was held on February 24, 1988. Throughout the year and a half that DVR's application was pending, it did not have documents memorializing the parties' oral agreement. But DVR did indicate in the covering letter to its application and in its application that it was a partnership where each of the three partners had equal ownership. DVR also indicated there that it was a general partnership. And DVR reported in Exhibit 1 to its application that the three partners were general partners for an AM station in Port St. Lucie, Florida.

86. There is sufficient evidence that the applicant's legal structure is not a sham and that the intentions of the partners with regard to their ownership was reported to the Commission from the outset. This is not the case where the owners' interest in the applicant is different from their control and, therefore, there is no reason to believe that DVR's partners held back their legal relationship to improve their comparative standing; there are no passive owners. Although the DVR partners waited until just before the integration and diversification statements were due to execute a partnership agreement, those statements and the partnership agreement reveal what DVR told the Commission in its application. The informality of DVR's legal structure does not indicate that it is a sham. *Coast TV*, FCC 89-47, released February 23, 1989, at ¶¶ 12-16.

87. The opposing parties also argue that DVR is not entitled to full-time credit for the integration promises of its partners because they did not indicate that they would divest or quit their current radio broadcast positions when

they acquired them. They did not hold their current broadcast positions at the time they filed the application on November 5, 1986. Shortly after the application was filed, on December 16, 1986, the Peraltas and Mr. Rowland began managing WITS and WCAC-FM, Sebring, which Ms. Peralta and Mr. Rowland's parents had purchased. At that point, DVR's answer to Section II, question 6 and Exhibit 1 to that question should have been amended but it was not. The Peraltas and Mr. Rowland made no timely motion to divest but they did state in their exhibits and their integration statement that they would leave their employment in Sebring and move to Rockledge. Ordinarily, integrated principals must inform the Commission about their intentions regarding their current employment on the day integration statements are due. Failure to indicate how two full-time jobs in different communities can be maintained results in a diminution or disregard of such a seemingly impossible integration promise. A willingness to make the claim after the due date is not permitted because it would then permit an unfair upgrading.

88. DVR's partners each have significant managerial interests at the Sebring stations. They share management responsibilities and have a "close family relationship." DVR Exh. 1, at 2. There is no question that their interest in the Sebring stations are cognizable if they were not divested. That promise to divest their broadcast positions had to be made at the outset (within 30 days) of acquiring the interest. DVR did not make a timely divestiture promise. Given this unique circumstance, DVR's principals were obligated to declare their intentions when they acquired them and since the relationship to be reported and divested was employment, it was then that DVR principals were expected to indicate their plans. The requirement has always been that an applicant's comparative case cannot be improved after the period for reporting the information has passed, except under exceptional conditions which are not present here. Broadcast managerial employment must be reported on Form 301 and, in the case of DVR, it had to be reported by January 16, 1987. No mention was made until March 20, 1988. For this reason, DVR will not be entitled to integration credit.

Conclusions -- Comparison of Integration Proposals

89. RRL and DVR are not entitled to credit for their integration proposals. RRL is not because its principal Charles Sampson does not actually control the partnership and his testimony about his participation is unreliable and untruthful. DVR is not because it failed to timely demonstrate that its partners would leave their current employment and spend full time at the Rockledge facility. RBA is entitled to integration credit for Spencer Allen but only to the extent of his 20% equity interest. RBA has failed to establish that its limited partners will not exert some control over the media operations of the partnership. Shaw is credited with only the 26% equity share owned by James Hummel. It is evident that the non-voting shareholder will share in the decisions to be made about the station and that Elaine Hummel, who promises to work at the station, will not exercise an important role in management where she will decide station policy and exercise control. Orion is to be preferred for its integration proposal because its only owner, Michael A. Kahn, will work full time at the station.

Diversification of the Media

90. Shaw, RBA, and DVR have attributable media interests. Orion and RRL have none and are, therefore, preferred. Wayne L. DiLucente, who owns 49% of Shaw's stock, has a relationship with and through his spouse, an ownership interest in WCXL, Vero Beach. Vero Beach is approximately 50 miles from Rockledge. Mr. DiLucente is an officer and director of the licensee, Treasure Coast Media, and the general manager of the station. His spouse, Sally DiLucente is a 50% owner of the facility, president, station manager, and director.

91. DVR's partners have essentially the same relationship to two stations which are approximately 70 miles from Rockledge in Sebring, Florida. Those stations, WITS-AM and WCAC-FM, are owned by the parents of two of DVR's partners, Valree Peralta and Robert Rowland. Douglas Peralta, Valree Peralta's spouse, is the general manager of the stations, Valree Peralta is the business manager, public service director, and operations director, and Robert Rowland is the program director. They have operated the stations since December 16, 1986. DVR, in March 1988, promised to divest these relationships but the promise was not timely and, therefore, this association will be considered.

92. RBA's partners, who own 80% of the partnership, have controlling interest in four radio broadcast stations and a small non- controlling interest in a construction permit for Holmes Beach, Florida. The stations they control are in Woonsocket, Rhode Island and Stroudsburg, Pennsylvania. One of the partners, William Cerny, with his family, owns and controls two stations in DeKalb, Illinois. Mr. Cerny is president and a director of the DeKalb licensee.

93. Because DVR's partners control DVR and have promised to operate the Rockledge facility and they already operate two stations near Rockledge, their proposal is to be least favored under diversification. Shaw's 49% owner, Wayne DiLucente, does not propose to operate the Rockledge facility on a day-to-day basis and, therefore, his day-to-day operation and attributed ownership interest in a nearby station makes Shaw less favored than all other applicants except for DVR on diversification. RBA's partners control RBA and the four stations they own in Rhode Island and Pennsylvania, but they do not propose to work at the Rockledge facility. Those stations are also a significant distance from Rockledge, Florida. Their interest in the Holmes Beach facility and Mr. Cerny's interest in the DeKalb facilities do not alter their comparative standing on this criterion. RBA is to be preferred on diversification over Shaw and DVR. Orion and RRL are equal on diversification and are to be preferred over the other applicants.

Other Matters

94. All the applicants propose auxiliary power and the applicant's coverage proposals present no decisionally significant differences. Orion is preferred overall for its integration proposal and its diversification standing; no other applicant is equally situated.

ACCORDINGLY, IT IS ORDERED that the applications of Rockledge Radio, Ltd. (File No. BPH-861104MB), Ben L. Umberger (File No. BPH-861105MB), Shaw Enterprises, Inc. (File No. BPH-861105ME), Rockledge Broadcasting Associates Limited Partnership (File No. BPH-861105MF) and D.V.R. Broadcasting (A General Partnership) (File No. BPH-861105MK) ARE DENIED and the application of Michael H. Kahn d/b/a Orion

Communications, Ltd. (File No. BPH-861105MH) for a construction permit for FM Channel 274A in Rockledge, Florida IS GRANTED.[3]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

[1] Charles Sampson was the only RRL owner who was examined at the hearing. Only Umberger requested an opportunity to examine RRL limited partner Richard Adams. No applicant requested that the other limited partner, Joseph Caruso, appear. Umberger claimed that Mr. Adams had written the limited partnership agreement and that it was the same agreement Adams had used when he applied for other broadcast facilities. RRL opposed producing Mr. Adams on the specific representation that Mr. Adams had not written the limited partnership agreement. RRL points out that Umberger had no support for its claim that Mr. Adams had prepared the agreement and that none of the applicants had questioned RRL about Mr. Adams' role during discovery. Because there was no evidence developed during discovery about Mr. Adams' role, Umberger's request was denied.

[2] RRL claims it will eliminate any provision of the partnership agreement that presents an obstacle to a grant. That promise cannot be credited, however, or it would permit RRL to improve its comparative standing after the hearing. This proceeding would never end if every time a flaw is found in an applicant's proposal, it were allowed to amend and be considered anew.

[3] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-78

In the Matter of

Inquiry into the Need for
A Universal Encryption Standard
for Satellite Cable Programming

NOTICE OF INQUIRY

Adopted: March 30, 1989; Released: April 14, 1989

By the Commission:

I. INTRODUCTION

1. The Satellite Home Viewer Act of 1988 directs the Commission to initiate three inquiries regarding the home satellite dish (HSD) programming market.[1] This inquiry concerns "the need for a universal encryption standard that permits decryption of satellite cable programming intended for private viewing." The Act provides that, if the Commission finds that such a standard "is necessary and in the public interest," then it "shall initiate a Rule Making to establish such a standard."[2] Congress has called on the Commission before to undertake an investigation of the HSD programming market.[3] At that time, we considered and rejected the imposition of a government-mandated encryption standard for satellite cable programming.[4] In this inquiry, however, we shall undertake a thorough re-examination of the issue of mandated encryption standards.

2. Congress directed us to take into account six factors in our standards inquiry. They are

> (1) consumer costs and benefits of any such standard, including consumer investment in equipment in operation;
>
> (2) incorporation of technological enhancements, including advanced television formats;
>
> (3) whether any such standard would effectively prevent present and future unauthorized decryption of satellite cable programming;
>
> (4) the costs and benefits of any such standard on other authorized users of encrypted satellite cable programming, including cable systems and satellite master antenna television systems;
>
> (5) the effect of any such standard on competition in the manufacture of decryption equipment; and
>
> (6) the impact of the time delay associated with the Commission procedures necessary for establishment of such standards.[5]

The comments in response to this Notice may bring other germane matters to our attention. Our conclusion in this inquiry will be based on an analysis of all the relevant factors.

II. BACKGROUND

3. The Cable Communications Policy Act of 1984 amended the Communications Act of 1934 to make it clear that the general prohibition of unauthorized interception and utilization of radio communications applies to encrypted satellite cable programming.[6] The statute defines "satellite cable programming" as "video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers."[7]

4. Currently, a large number of satellite cable programmers scramble their signals.[8] The encryption technology used is the Videocipher II (VC II). This system was developed by a firm called M/A Com, Inc. under contract to Home Box Office (HBO). By its own account, HBO's initial goal in scrambling its signals was to thwart commercial theft of its services (*i.e.*, by small cable systems and commercial establishments). When HBO issued its request for proposals in 1982, relatively few households had HSD systems (*i.e.*, dish antennas, satellite receivers, and associated components) and HSD equipment was quite expensive. The original system that M/A Com, Inc. developed, known as the Videocipher I, utilized decoders that were to have retailed at $3,500 each.

5. In 1984, after concluding that the HSD market was growing faster than it had anticipated, HBO contracted with M/A Com, Inc. to modify the encryption system in order to make sales to HSD households practical. HBO instructed M/A Com, Inc. to develop a system for which the decoders cost substantially less than those for the Videocipher I and for which the decoders were compatible with the vast majority of HSD systems. The resulting system was the Videocipher II (VC II). The initial retail price of decoders was $395.

6. On January 15, 1986, HBO became the first major satellite cable program service to scramble its satellite feeds.[9] In March of 1986, Eastern Microwave scrambled its satellite feed of superstation WOR using the VC II system. Showtime and the Movie Channel, both owned by Viacom, scrambled their satellite signals in May of 1986, also using the VC II. In September of 1986, the General Instrument Corporation (GIC) purchased the Video Products Division of M/A Com, Inc., which included the VC II business.[10]

7. In the meantime, concern was developing about whether a standard encryption system would be adopted and about the price and availability of programming to HSD households. This prompted the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Energy and Commerce Committee to examine HSD issues at hearings on March 6 and June 12, 1986. At the latter hearing, the Commission agreed to a Congressional request to investigate the terms and conditions under which satellite programming was being scrambled and offered to HSD owners.[11]

8. The inquiry examined, among other topics, the development of descrambling equipment, whether the marketplace was generating a *de facto* standard, the marketing and distribution systems that were developing for programming, and the legal and policy issues related to

the scrambling of "network feeds" and "superstations." The results of the Commission's inquiry are set forth in the *Report* and the *Second Report*.[12]

9. In our earlier inquiry, we determined that the public interest would not be served by a government-mandated encryption standard.[13] This decision was based on two conclusions. First, we found that the marketplace had settled on the VC II as a *de facto* standard, thus freeing consumers from the necessity of purchasing more than one decoder.[14] Second, we found that a mandated standard would limit incentives to develop improvements in encryption technology for satellite cable programming, noting that the "need to secure government approval for a revision in the standard, in the face of likely opposition from entrenched partisans of the status quo, would likely discourage potential innovators."[15]

10. We are, of course, aware that changes in encryption technology are certainly possible. However, we noted that

> programmers and equipment manufacturers are unlikely to alienate customers and distributors by capriciously changing technologies in such a way as to obsolete existing equipment. Improvements are likely to be compatible with the original system and/or gradual, so that any incompatible equipment may be amortized. This does not rule out, nor should it, the chance of a quantum leap in technology leading to drastically improved quality or reduced cost.[16]

As part of our re-examination of the standards question, we invite comment on and critique of our earlier analysis.

11. Our earlier analysis led us to conclude that the number one problem facing the HSD industry today is theft of satellite program services (so-called "piracy"). Piracy entails the decoding of programming without the authorization of the programmer and without payment for the programming. At present, the techniques for unauthorized decryption all involve ownership of a legitimate VC II decoder. Decoder owners pay a fee for an additional chip (and associated software) which is attached to the decoder, enabling decryption without authorization. In the *Second Report*, we noted that unchecked piracy could halt satellite-to-home program distribution and recommended that Congress amend the Communications Act to increase the penalties for piracy.[17] The Satellite Home Viewer Act of 1988 contains provisions raising those penalties effective January 1, 1989.[18]

12. Unfortunately, theft of satellite program services remains a very substantial problem. The president of the Satellite Broadcasting and Communications Association (SBCA) recently estimated that 50 percent of decoders in use were "pirate boxes."[19] Estimates of this nature are necessarily imprecise, but this one appears to be widely accepted. According to GIC, there were 476,304 decoders legitimately authorized for service as of the end of January 1989.[20] GIC also reports that as of the end of 1988, it had shipped a total of 1,146,414 decoders or modules.[21] As of the end of 1988, a cumulative total of 2,098,690 HSD systems had been installed.[22] Assuming that all of these systems are in households and that there is one system per household, it is possible to conclude that at present, roughly three years after scrambling began, 22.7 percent of HSD households (*i.e.*, 476,304/2,098,690) have legally authorized VC II decoders, and 45.4 percent of such households (*i.e.*, 22.7 percent x 2) are making use of the VC II either legitimately or otherwise. The other 54.6 percent of HSD households do not have VC II decoders.

13. GIC, the SBCA, and others in the industry have taken a series of measures to combat piracy.[23] One technique that GIC has used is referred to as electronic countermeasures (ECM). This entails deauthorization of decoders that GIC has reason to believe have been altered to allow unauthorized reception of encrypted programming. Since GIC cannot know with certainty in advance of ECM if particular decoders are legitimate, this process involves some mistakes. In recent months, ECM have been instituted against as many as 300,000 decoders, with an error rate of three percent, according to GIC.[24]

14. GIC has also initiated a series of three software and hardware improvements in the VC II module. The third of these, known as the Videocipher II Plus (VC II Plus) is scheduled for introduction in late 1989.[25] The VC II Plus will incorporate software improvements and will make use of a new, very large scale integration (VLSI) chip. The VLSI chip will, for the first time, combine all of the security functions of the decoder on a single chip, which GIC believes will make it harder for pirates to penetrate.

15. In addition to the enhanced security features of the VC II Plus, GIC is calling attention to its higher "addressing rate."[26] This feature provides an increased capacity for sending the messages that authorize and reauthorize the units to decode scrambled programming. It will allow the system to service more customers and/or send reauthorization messages more frequently. This could improve the reliability of the monthly process of reauthorizing legitimate subscribers to scrambled program services.

16. The VC II Plus will also have 200 new "tier bits" in addition to the 56 that are also available on the VC II.[27] A tier bit is, in essence, an on-off switch that can be used to control access to an encrypted program channel or package of channels. The 56 VC II tier bits have all been reserved by programmers, but not all of them are in use yet. The VC II Plus system provides the capacity to serve a large number of additional programmers. After the VC II Plus is introduced, programming delivered using the first 56 tier bits will remain available to VC II owners.[28]

17. In recent months the Commission has received a number of identical complaints against GIC from HSD owners and retailers. A specimen is attached to this Notice as Appendix A. These complaints request the Commission to investigate "the encryption portion of the satellite television industry." They urge the Commission to examine issues relating to the theft of satellite program services and to establish an encryption standard. The complaints also contain certain allegations regarding GIC. These complaints will be considered as part of this proceeding.[29] We believe that the substantive issues raised in them are addressed by the analysis and questions in Section III. *infra*. However, we also specifically invite comment on any allegations and/or proposals in these complaints that are not covered in Section III.

III. ISSUES

18. The six subsections that make up this section are devoted to the six criteria that Congress instructed us to take into account in determining whether a mandatory encryption standard would be in the public interest. We

hope to establish a comprehensive record in this proceeding. Hence, we urge commenters to address the issues and answer the questions posed *infra* and to provide us with any additional information that they consider germane to our public interest determination regarding encryption standards for satellite cable programming. Commenters may wish to analyze the relationship between the standards issue and the feasibility of applying syndicated exclusivity rules to syndicated programming on broadcast stations retransmitted by satellite to HSD households. Congress directed us to initiate a combined inquiry and Rule Making proceeding on this matter (*supra* note 1) and it is possible that the choice of an encryption standard could affect the technical feasibility of implementing such syndicated exclusivity rules.

A. *Consumer Costs and Benefits of a Standard, Including Consumer Investment in Equipment in Operation*

19. Those who advocated a mandated encryption standard in our previous inquiry advanced two major arguments. First, they suggested that a standard would make it unnecessary for consumers to purchase more than one decoder. Second, they asserted that decoder prices would be lower under a standard. We seek comment on both of these propositions. In particular, does the widespread voluntary adoption of the VC II provide adequate assurance that consumers do not have to purchase multiple decoders? With respect to decoder prices, it is not clear to us how adoption of a standard *per se* could reduce them. It appears that proponents of this viewpoint are implicitly assuming that the standard would be accompanied by some sort of compulsory licensing of the technology at "reasonable" royalties.[30] We urge commenters to spell out the mechanism by which the adoption of a standard might affect decoder prices and to make explicit any assumptions they might make regarding licensing and royalty rates.

20. Proponents have also argued that adoption of a standard may reduce uncertainty among consumers regarding encryption technology. When satellite cable programmers were just beginning to scramble their signals, there was some confusion and uncertainty among consumers regarding what technology or technologies would be employed for scrambling. In such an environment, adoption of a standard could undoubtedly reduce consumer uncertainty. On the other hand, if the marketplace settles fairly promptly on a standard, uncertainty could be dispelled without government action. The general question here is whether, in the case of satellite cable programming encryption equipment, government action to set a standard would be quicker than private action. The specific question is whether the HSD programming market is now in a state of uncertainty regarding encryption standards. We invite comment on both. In particular, we seek information on the scrambling practices and plans of satellite cable programmers, in order to determine if the VC II remains a *de facto* industry standard.[31]

21. Proponents further claim that a mandated standard could dispel consumer fears that decoders might quickly become obsolete. A market-adopted standard could probably be changed more rapidly than a government-mandated one. We seek comment *infra* at paras 62-65 on the question of how long it would take for the Commission to establish a standard. We also invite comment on the time lag associated with administrative procedures to alter or change an existing standard. We note that the administrative process is a two-edged sword. It can provide consumers with advance warning of prospective changes in standards and slow the process of change, protecting against obsolescence of equipment. However, the same mechanism can work to reduce the incentives for developing improvements in the encryption system and allow partisans of the status quo to slow down the introduction of new technology.

22. In order to evaluate the possible benefits of a standard as "obsolescence insurance," it is important to consider the incentives of manufacturers and programmers and the characteristics of decoders. GIC, the patent holder and primary manufacturer of the VC II, has three groups of customers--consumers, other manufacturers (who purchase VC II modules for IRDs that they then sell to consumers), and programmers. The programmer customers play a key role because they are the ones that make the choice to adopt the VC II (or some other) encryption system. Consumer demand for VC II decoders and manufacturer demand for VC II modules is triggered by programmer utilization of the VC II system.

23. Programmers adopt an encryption system because they desire a mechanism by which they can collect compensation from HSD households for viewing of their product (and in order to ensure that they receive compensation from commercial users--cable systems, *etc.* --as well). They are interested in making it as easy as possible for consumers to purchase their program services. Hence, they have their own incentives to limit changes in decoder technology that make existing equipment obsolete. Because of their key role in choosing the encryption system used, prospective providers of encryption equipment must take programmers' demands into account. Thus, it appears that manufacturers too have incentives against obsoleting equipment excessively fast. We seek comment on the strength of this mechanism and its applicability to the satellite cable programming encryption standards situation.

24. The obsolescence insurance benefits of an encryption standard are also related to the rate of technical advance in satellite receiver equipment generally. An increasing share of decoders sold are IRDs, rather than standalone units.[32] Some HSD owners may find it desirable to replace their satellite receivers (including IRDs) before they have worn out in order to acquire new features unrelated to decoding capacity. We therefore seek comment on the technological depreciation characteristics of satellite receivers. The more frequently satellite receivers are replaced for other reasons, the less valuable to consumers is the assurance that decoder standards will remain fixed.

25. In general terms, the potential costs to consumers of an encryption standard are the discouragement of innovations in encryption technology and the possible delay in adoption of those improvements that are made. It is also possible that the administrative process is not well-suited to picking the best standard. In other words, the Commission might not pick the optimal standard, with attendant costs to consumers. Additionally, we note that, in the case at hand, if the Commission were to set a standard other than the VC II, existing VC II equipment would likely be made obsolete. We seek comments on these possibilities.

26. We do not see encryption standards as immutable. Even if the Commission were to establish an encryption standard, we would have to allow for the possibility that it might be altered or revised. Moreover, if the incentives,

outlined *supra* at para 10, for manufacturers and programmers to provide a smooth transition were, in fact, strong, then the value of a standard as obsolescence insurance would be diminished. We believe that some insight into the operation of these incentives can be gained by examining the pending introduction of the VC II Plus.

27. The VC II Plus is best described as a new generation of VC II. The basic encryption technology is the same, but the VC II Plus has some new features not available on the VC II. For questions of obsolescence and of compatibility between the two generations, the key factor is the different number of tier bits (*supra* para 16). The VC II has 56, while the VC II Plus has those 56 plus an additional 200. The two generations are compatible in the sense that programming authorized via the original 56 tier bits is available to users of both the VC II and the VC II Plus. Programming authorized via the additional 200 tier bits is available only to users of the VC II Plus.

28. GIC points out that the new tier bits, along with the other new features of the VC II Plus, represent enhancements, additional capabilities and value provided to VC II Plus owners. However, the situation is complicated by the fact that the installed base of VC II decoders has proven so vulnerable to piracy. GIC hopes that the VLSI chip used in the VC II Plus, and other features, will make it far less susceptible to piracy.[33] If this hope is realized, programmers might find it attractive to move their services from "old" tier bits to "new" ones, in order to stop the theft of their services. This would be an expensive procedure, however, since programmers would lose access to the installed base of almost 500,000 legally authorized VC II decoders, a base that contains the customers who made early commitments to their services.[34]

29. On the other hand, it is our understanding that the VC II decoder can be retrofitted by insertion of a new module to give it the capabilities of the VC II Plus. GIC has not yet addressed publicly the question of how, at what price, and to whom (*e.g.*, to manufacturers, to programmers, to retailers, direct to consumers, or some combination of those options) such modules would be supplied. Nor is information available on the cost of such retrofitting. GIC has recently indicated that it "has absolutely no intention of allowing existing subscription services to transfer to tier bits above today's Tier Bit 56."[35] However, GIC officials have left open the possibility that programmers may be able to use an "old" and a "new" tier bit at the same time, and it seems reasonable to assume that eventually the "new" tier bits will be made available to new programmers.[36]

30. GIC officials have also indicated that, if the VC II Plus is not compromised, they would like to see the VC II units eventually replaced by VC II Plus units. This could be accomplished by ECM, repairing broken legitimate VC II's by exchanging the module for a VC II Plus, and the voluntary replacement by legitimate consumers of old or otherwise unsatisfactory satellite receivers.[37] These measures could reduce the pool of actual or potential pirate decoders in circulation. If this pool becomes small, then programmers would reap no benefits from switching to "new" tier bits.

31. We seek comment on the introduction of the VC II Plus from all segments of the HSD market. We are interested in the plans of GIC with respect to use of the new tier bits, access to which it controls. We are interested in the demand for new tier bits by programmers, old and new. We are interested in the cost and procedures for retrofitting VC II's. We also request comment on who will likely finance the conversion process and whether there is any basis for government intervention to determine the responsibility for financing it. Broadly speaking, we seek comment on the implications of the transition from VC II to VC II Plus for the question of whether a mandated standard would serve the public interest.

B. *Incorporation of Technical Enhancements, Including Advanced Television Formats*

32. We have already suggested that a government-mandated encryption standard may blunt the incentives for innovation and slow the adoption of technical enhancements, due to the need for an administrative proceeding to revise an existing standard. Such a proceeding takes time and provides the opportunity for any private interests that might be disadvantaged by new developments (*e.g.*, producers of equipment that might be replaced or rendered inferior by such advances) to delay their adoption. We reiterate our interest in comments evaluating this analysis of the effects of mandated standards on innovation incentives.

33. With respect to advanced television formats (ATV) in particular, the Commission is in the process of considering technical standards for that service.[38] There is, at present, no consensus on ATV technical standards, but it appears unlikely that the VC II would be compatible with the possibilities under discussion.[39] In fact, any encryption standard chosen prior to the adoption of ATV standards runs the risks of being incompatible with those standards or skewing the choice of ATV standards in the direction of compatibility with the encryption standard.[40] We seek comment on these matters.

34. The pending development of ATV may, as suggested in the previous paragraph, militate against adoption of encryption standards. Alternatively, it may simply imply that a standard should not be adopted *now*. If a standard were adopted now and an incompatible ATV standard were adopted later on, there might be strong pressure to revise the encryption standard. If one expects ATV to be with us relatively soon, then encryption standards adopted now could be short-lived. Therefore, if ATV is viewed as the type of technical change that occurs infrequently, it might be prudent to delay setting encryption standards until ATV standards have been set. If, on the other hand, ATV is viewed as one in a continuing stream of technical advances, then the adoption of ATV standards would be less relevant to a determination of when or whether encryption standards would be in the public interest. We seek comment on these issues.

C. *The Effect of a Standard on Present and Future Unauthorized Decryption of Satellite Cable Programming*

35. Unauthorized decryption of satellite cable programming, known colloquially in the HSD industry as "piracy," is, in essence, theft of satellite program services.[41] In order to assess the effect of a standard on piracy, it is helpful to consider the factors that influence a consumer's choice between legitimate program subscriptions and piracy.

36. We surmise that the incidence of piracy is a function of the following factors--the price of decoders, the price of programming, the civil and criminal penalties for piracy, the probability of getting caught, dish owner attitudes toward violating the law against theft of satellite

services, and the demand for American satellite cable programming by foreigners in areas surrounding the United States (such as Canada, Mexico, and the Caribbean). The price of authorized access to encrypted satellite cable programming depends on the price of decoders and program service subscriptions. We would expect the incidence of piracy to be positively related to the price of authorized access. The incidence of piracy is negatively related to the severity of the legal penalties against it and the probability of getting caught. Dish owner attitudes about the fairness of the legal restrictions on reception of satellite transmissions doubtless play a role as well, but we have no way of quantifying it.

37. Foreign demand is listed as a separate factor because in most cases foreigners cannot subscribe to American satellite cable services because those services do not have foreign exhibition rights for their programming.[42] However, the satellite feeds of American programmers are receivable in substantial areas outside the United States. People in those areas face a programming subscription "price" that is infinite (*i.e.*, they cannot subscribe at *any* price). Without the option of a legal subscription, there are incentives for piracy.

38. With this framework as a background, we seek comment on how adoption of a standard would affect consumer demand for pirate decoders. On initial consideration, the only possible effect that we see is if the standard were to lead to reduced decoder prices. In this event, a standard might reduce piracy. We seek comment on this scenario and on any other mechanisms by which a standard might affect the incidence of piracy.[43]

39. In Congressional testimony, GIC has suggested that a standard might actually hamper the struggle against piracy.[44] GIC raises the possibility that the administrative process of adopting a standard might lead to the public dissemination of sensitive specifications for the security function of the encryption system. In addition, GIC suggests that a standard might inhibit its ability to implement ECM against suspected pirates. Presumably these problems would face the producers of any encryption system, not just GIC. We seek comment on these issues.

40. In order to assess the potential impact of a standard on piracy, we believe that it is important to examine the private incentives to combat it. Having done so, it will then be possible to isolate the incremental effect of standards on anti-piracy efforts. It seems clear that programmers have strong incentives to act against piracy and/or to exert pressure on the manufacturer(s) of encryption equipment to do so.[45] They receive no payment at all from pirates. Hence, turning pirates into regular subscribers represents a significant source of potential revenue for programmers. If the owners of each of the approximately 500,000 pirate decoders in use instead subscribed to $20 per month of programming (a relatively modest amount), the annual gross revenues would be $120 million.

41. While GIC's situation is slightly less straightforward, we believe that it too has strong incentives to combat piracy. Because of their strong interest in preventing piracy, programmers will not continue to use a compromised system indefinitely. Nor will they be likely to select a replacement system from a provider whose previous effort was unsuccessful. Hence, GIC (or any provider of encryption equipment) would stand to lose substantial revenues in the long run if its encryption system were not secured against piracy.

42. Because current techniques of VC II piracy all require a legitimate VC II decoder, GIC receives revenue from sales of decoders to pirates as well as legitimate users. Thus, in the short run, it could be said that GIC "profits" from piracy. However, we believe that the long run costs to GIC of piracy far outweigh any short term revenues it might gain from sales of decoders to pirates. Hence, we believe that GIC has strong incentives to combat piracy (as would another holder of patents for encryption equipment).

43. Moreover, even in the short run, the magnitude of the effect of piracy on GIC profits is not clear. To calculate it, one would first need to know how many owners of pirate decoders would have purchased a decoder anyway if they had been secure from tampering. While many such owners would not have purchased a decoder in this event, some would have, although perhaps at a later date than they did in the presence of piracy. Next, one would need to know, for those who would not have purchased a decoder in the absence of piracy, how many bought standalone units and how many bought IRDs. Standalone units are made only by GIC, while many IRDs are made by other manufacturers using modules purchased from GIC or Channel Master. The wholesale price of a module is roughly half that of a standalone decoder, and the profit margins on the two are likely to differ.[46] The final step in the process of calculating GIC's short run "profit" from piracy would be to subtract the money it spent on anti-piracy activities from its net revenues on pirate decoder sales.

44. We invite comment on our analysis of the incentives that GIC and the programmers have to combat piracy. We are also interested in comment on whether there is any reason to believe that GIC would behave differently than any other manufacturer in a similar position (*i.e.*, as holder of patents covering an encryption system voluntarily adopted by a wide range of satellite cable programmers. As noted *supra* at para 19, some proponents of a standard appear to assume that it would be accompanied by regulation of the licensing and royalty practices of patent holders. We invite any commenters making that assumption to comment on how such regulation would affect the incentives of equipment manufacturers to combat piracy. In addition, we invite comments on the incentives of other parties, such as distributors, to combat piracy, and the effect, if any, of a standard on their incentives.

45. In addition to the matters discussed *supra*, we also seek more specific comment on VC II piracy. We believe that the industry's experience with the compromise of the VC II can provide useful lessons for the future regarding piracy and standards. As a preliminary matter, we seek information on the state of VC II piracy today. What is the incidence of piracy now? Has the most recent VC II software and/or hardware been compromised? We also seek information regarding how the VC was compromised. In what ways would a standard protect against the techniques used to compromise the VC II? Would a standard be more likely than private efforts to protect against design errors that might lead to the compromise of an encryption system?

46. We also invite commenters to submit information regarding the identity of those who have compromised the VC II. Because the primary responsibility for enforcement of federal laws against theft of satellite program services

lies with the U.S. Department of Justice, we anticipate forwarding any information received on this subject to federal law enforcement authorities.[47]

47. Ultimately, the legitimate consumer pays for piracy, whether it be through higher prices for decoders and programming or, in the extreme, through the loss of access to satellite-delivered programming.[48] Hence, if adoption of a government-mandated standard were to lead to a reduction in or the end of piracy, consumers would benefit. We seek comment on this aspect of the piracy-standards relationship too.

D. ***Costs and Benefits of Standards to Other Authorized Users of Encrypted Satellite Cable Programming***

48. The costs and benefits of an encryption standard to commercial authorized users of satellite cable programming are similar but not identical to those faced by consumers. Other than consumers, cable systems are the major authorized users of encrypted satellite cable programming. Additional users include satellite master antenna television (SMATV) systems and multichannel multipoint distribution service (MMDS). We seek comment on what if any other categories of authorized users are relevant.

49. The potential benefits to consumers of a standard include relief from the necessity of purchasing multiple decoders (in the event that the market does not coalesce on a *de facto* standard) and reduced decoder prices. The former is significantly less important for the commercial users considered here than it is for consumers. Commercial users must be prepared to provide simultaneously all of the channels that they offer. Hence, they need a separate decoder for each scrambled service offered. If different programmers were to choose different encryption systems, it would have little effect on the number of decoders that commercial users would need. Nevertheless, commercial users do require backup capacity to ensure uninterrupted service in the event that a decoder malfunctions. The necessary investment in such capacity is lower if all scrambled services use the same encryption system than if multiple systems are used.

50. Other things being equal, commercial users, like consumers, prefer lower decoder prices to higher ones. If adoption of a standard were to bring lower decoder prices, commercial users would benefit. Comments on the relation between standards and decoder prices were solicited *supra* at para 38,[49] and we believe that, for this particular matter, the analysis is the same for consumers and commercial users.

51. The other potential benefits of a standard mentioned in our discussion of consumer decoders are a reduction in uncertainty regarding encryption technology and the provision of "obsolescence insurance." We believe that both are relevant to commercial users but the potential benefits to them are of lesser magnitude than those to consumers. A great deal of the uncertainty regarding encryption technology that has faced consumers stems from the fact that different programmers adopted encryption systems at different times. The consumer could not be sure that the decoder purchased to gain access to services scrambled early in the process would also permit access to services that scrambled later. This is a smaller problem for commercial users because, as explained *supra* at para 49, they require a separate decoder for each scrambled service carried. Hence, purchasing a decoder for a service that scrambles early does not significantly raise the price faced by commercial users to gain access to services that scramble their signals later.

52. Moreover, the choice facing a commercial user when a service that it carries scrambles its signal is clear-cut--either acquire a decoder or drop the service. These users generally cannot wait to see what happens with other services. On the other hand, consumers generally have some other services available, either unencrypted satellite services or services delivered by other media. Hence, the possibility of deferring a decision is open to them in a way that it is not open to commercial users.

53. Commercial users are, like consumers, concerned about obsolescence of their equipment. However, it appears that commercial users can amortize their decryption equipment more rapidly than consumers. Commercial VC II decoders are more expensive than consumer units, but the price difference is not substantial.[50] (We are interested in verifying the current price differential between consumer and commercial units.) Moreover, programmers sometimes defray part of the cost of the decoders acquired by their affiliates. Even though commercial users require one decoder per encrypted service carried, since the total number of encrypted services numbers only in the dozens, all but the smallest commercial users are likely to have a large number of subscribers per scrambled signal carried. Hence, the burden of replacing or retrofitting decoders to accommodate a change in encryption systems appears smaller for commercial users than for consumers.

54. These considerations suggest that the benefits of a standard might be lower for commercial users than for consumers. There is, however, one potential benefit that affects commercial users only. Because theft of satellite services is relatively easy to accomplish, it may skew the choice of households between, for example, cable and HSD delivery systems.[51] If it is true that adoption of a standard would reduce theft of satellite services (*see supra* at paras 36-38), then commercial users might benefit from additional subscribers. Some who might have chosen HSD distribution in an "easy piracy" environment might opt for cable.

55. The analysis of costs of a standard to commercial users appears identical to that for consumers. Commercial users stand to benefit from innovations that reduce cost and/or increase the quality and capabilities of encryption equipment. To the extent that a standard would discourage investment in product development and slow the adoption of those new features that are developed, commercial users would be disadvantaged by a standard. We seek comment on this entire analysis of costs and benefits of a standard to commercial users. If there are any cost/benefit considerations that we have overlooked, we urge commenters to bring them to our attention. In their discussions of costs and benefits, we encourage commenters to point out the similarities and differences between the situations of consumers and commercial users.

E. ***The Effect of A Standard on Competition in the Manufacture of Decryption Equipment***

56. The VC II system is protected by patents held by GIC. Manufacturers of decryption equipment require a license from that company. At first glance, it appears that this situation would be unchanged if the Commission were to establish the VC II as a mandated encryption standard. Hence, we do not believe that establishment of a

standard *per se* would necessarily affect the level of competition in the manufacture of decryption equipment. If establishment of a standard were accompanied by a requirement for compulsory licensing of the technology at "reasonable rates," then competition (and decoder prices) might be affected. As a preliminary matter, then, we urge commenters on this issue to specify clearly their assumptions regarding what, if any, licensing and royalty regulations would accompany adoption of a standard and to address the question of our authority to impose licensing and royalty regulations. In this connection, we note that patents are, in effect, legal "temporary monopolies" granted to provide incentives for investment in the development of new technology. Patent holders are generally not obligated to license patents and are legally entitled to set royalties for any users they do choose to license.

57. The VC II is not, of course, the only possible encryption system. If a system were chosen that depends on patents held by more than one firm, then, even without regulation of licensing practices, the outcome might differ from the case in which one firm controls all the key patents for the system. We seek comment on the impact of a standard on competition in manufacturing and on the price of decryption equipment in the event that one firm holds the patents on the encryption system (*e.g.*, GIC and the VC II) *and* in the event that two or more firms own relevant patents.

58. In order to provide context for the analysis of this issue, we believe that it would be useful to summarize the current state of competition in encryption equipment manufacturing. There are currently two types of consumer decoder--the standalone unit and the IRD. GIC is the sole manufacturer of standalone decoders. The decoding capability is contained in a plug-in module. GIC has licensed one firm, Channel Master, to manufacture VC II modules and roughly two dozen firms to manufacture IRDs. The IRD licensees purchase modules from GIC or from Channel Master. The VC II module contains certain proprietary chips (components). Channel Master purchases these chips from GIC. We seek comment on the accuracy of this description.

59. At present, then, there is no competition in the manufacturing of standalone decoders. However, it should be noted that the standalone decoder is widely considered to be a transitional product.[52] Ultimately, most if not all consumers will acquire decoding capacity by purchasing an IRD. We requested comment *supra* at para 24, note 32 on the shares of decoder sales accounted for by standalone decoders and IRDs. There is also no competition in the supply of the proprietary chips needed to manufacture the VC II module. All must be acquired, directly or indirectly, from GIC. (Of course, GIC may have contracted with more than one supplier to manufacture these chips.) There is competition between GIC and Channel Master in the fabrication of modules and, indeed, it appears that in some instances Channel Master has offered lower module prices to IRD manufacturers than GIC has.[53] The scope and significance of this competition depends on the value added by Channel Master in module production. The scope for competition is greater as the value added is greater. That is, if the price to Channel Master of the proprietary chips is a *small* fraction of the total module cost, the scope for competition is greater.

60. There is competition among the two dozen or so IRD manufacturers on all satellite receiver features except for decoding capacity. IRD manufacturers all must purchase identical VC II modules. There is limited scope for competition with respect to the manufacturing process of inserting the modules. It is possible that some manufacturers are more efficient than others at doing this and could gain some minor price advantage from it.

61. In addition to comments on the accuracy of our depiction of the current situation, we request information on expected future developments. If the standalone decoder is a transitional product, how long will demand for it continue? Does GIC have plans to alter its licensing practices due to the introduction of the VC II Plus system or for any other reason?

F. *The Impact of the Time Delay Associated with Commission Procedures Necessary to Establish a Standard*

62. Under this heading, we seek comment on two questions. First, if the Commission were to decide to establish an encryption standard, how long would it take to complete the process. Second, what would be happen to the HSD programming market during that process. On the first matter, GIC has asserted that the time period would be a "minimum of two years, if there are no court appeals."[54] The Commission has been involved in a wide variety of standard setting proceedings on which commenters could draw to formulate their own estimates of the relevant time period. Several of them are analyzed in a Rand Corporation study by Besen and Johnson.[55] In the case of television stereo sound, the Commission decision process took less than one year. In this instance, the Commission did not actually set a standard but chose to protect from interference only systems that conform to specifications recommended by an industry committee.[56] In the case of AM stereo, the Commission ended up deciding against a government-mandated standard in a proceeding that took roughly five years.[57] The Commission is currently in the midst of a proceeding examining ATV issues, including the question of standards.[58]

63. If the Commission were to begin a proceeding to establish an encryption standard for satellite cable programming, it is likely that sales of decoders and HSD systems would be adversely affected. Consumers would be more reluctant to purchase decoders in the face of a real possibility that they would be made obsolete by the promulgation of a new standard. However, some might gamble that the VC II would be chosen, or alternatively, that the standard setting process might take such a long time that a VC II decoder could be amortized by the time any new standard went into effect. To the extent that decoder sales are depressed during the proceeding, it is likely that the demand for HSD systems would drop as well. Without access to the wide array of scrambled programming, the value of an HSD system to consumers is substantially reduced.

64. We believe that those programmers who have already invested in VC II equipment would continue to scramble their signals. The installed base of roughly 500,000 legal decoders represents a significant source of revenue to programmers. It is possible that some programmers who have not yet scrambled their signals might decide to do so during this period. Their decisions would be based on a comparison of the revenue to be gained from HSD subscriptions (and, perhaps, revenue from new commercial affiliates that had previously been using their service without payment) with the cost in terms of the encryption equipment that the programmer would need to purchase. (There is also the issue of whether the ser-

vice's cable affiliates value it enough to purchase VC II decoders and the extent to which the programmer might find it necessary to subsidize these purchases.)

65. Responses to the question of HSD market behavior during the pendency of a Commission standard-setting proceeding necessarily involve an element of speculation. For that reason, it is particularly important for commenters to make explicit their assumptions about that market, about the structure of a Commission proceeding to set encryption standards, and about any other parameters they deem relevant.

IV. CONCLUSIONS AND ADMINISTRATIVE MATTERS

66. The Commission's Congressional instructions regarding this proceeding are fairly detailed, identifying six factors for us to take into account as we consider whether a government-mandated encryption standard for satellite cable programming would serve the public interest. In this Notice, we have presented a preliminary discussion of those factors in order to provide a basis for the more comprehensive analyses that we hope to receive in the comments. We do not claim that our discussion of the six factors is exhaustive. Commenters are encouraged to expand upon it in any way that they believe relevant. Likewise, if there are topics beyond the six listed in our statutory instructions that are germane, we encourage comment on them as well.

67. This Notice is issued pursuant to authority contained in Sections 4(i), 303(r), 403, and 705(f) of the Communications Act of 1934, as amended. 47 U.S.C. 154(i), 303(r), 403, and 605(f). Under the applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **June 5, 1989** and reply comments on or before **July 5, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C., 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

68. For further information concerning this proceeding, contact Jonathan D. Levy, Office of Plans and Policy, (202) 653-5940.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Appendix A

Before the Federal Communications Commission, Washington, D.C.
File No. Docket No.
Complainant

1_____

2_____

Name Occupation Mailing Address

VS.

General Instrument (Video Cypher Div.) 2200 Byberry Rd. Hatboro, PA

General Instrument has contrived to supply the encryption system for consumer decoding of television programs in a monopoly environment. GI has further manipulated supply of decoders to create shortages in order to maintain an inflated price level on decoders.

GI has designed early obsolescence of the decoder by limited program handling capability. This company has announced release of newer equipment which will make contracted receiver/decoders manufactured by competitive companies incapable of utilizing the new system.

General Instrument has failed to exercise sufficient control and enforcement measures to prohibit or halt signal piracy and has, indeed, profited grossly by this illegal activity.

GI, in their haste to prevent a mass exodus from cable dependency to direct satellite reception, has failed to fulfill the market need for an efficient and desirable industry standard system to the extent that programmers are using at least five other encryption systems to ensure security of their product, thus placing a financial and convenience burden on the American Consumer.

Relief Desired:

That the FCC undertake an immediate in-depth investigation of the excryption portion of the satellite television industry to determaine the status of and resolution for the following:

Video Cypher Division personnel testified before both Houses of Congress that VCII was unbreakable. It is broken. FCC must now determine who broke it, why, how and if indeed there is any connection between those parties and the manufacturer who had enjoyed the profits therefrom.

Provisions must be established to terminate the continued profiteering from piracy. The monetary burden of this endesavor should not be borne by the American taxpayer as it is a private enterprise problem.

The FCC should establish a standard to which multiple manufacturers can build. These standards should not only ensure protection of program suppliers but must also ensure protection of the consumer investment in decoding equipment.

Date at Time:_____ this_____ day of _____ 1988

I declare under penalty of perjury that I am the complainant in the above entitled matter, that I have read the foregoing complaint; and that the matter and things therein are true and correct, to the best of my knowledge and belief.

Signature_____

Signature_____

FOOTNOTES

[1] Pub. L. No. 100-667, 102 Stat. 3949, 3958-59 (1988). In addition to the present inquiry, the Commission is directed to initiate a combined inquiry and Rule Making proceeding to determine the feasibility of applying syndicated exclusivity rules to syndicated programming on broadcast stations retransmitted by satellite to HSD households. The Act also mandates an inquiry into possible discrimination by satellite carriers of broadcast signals (of superstations or network stations) retransmitted to HSD households by satellite against certain distributors of those signals. These inquiries will be initiated separately.

[2] *Id.* These provisions will be codified at 47 U.S.C. 605(f) and (g). The Commission is required to initiate this particular inquiry within six months after the date of enactment of the statute, which was November 16, 1988. *See also Satellite Home Viewers Act of 1988.* H. Rep. No. 100-887, Part 2, 100th Cong., 2d Sess. (*House Report*) at 27-28.

[3] *See Report* in Gen. Docket No. 86-336, 2 FCC Rcd. 1669 (1987) (*Report*) and *Second Report* in Gen. Docket No. 86-336, 3 FCC Rcd. 1202 (1988) (*Second Report*).

[4] *See Second Report, supra* note 3, at paras 16-17 and *Report, supra* note 3, at paras 39-52.

[5] Satellite Home Viewer Act of 1988, *supra* note 1 at 3958-59. These provisions will be codified at 47 U.S.C. 605(f).

[6] Pub. L. No. 98-549, 98 Stat. 2780 (1984). The general prohibition is codified at 47 U.S.C. 605(a). The provisions regarding satellite cable programming are codified at 47 U.S.C. 605(b) and (c).

[7] 47 U.S.C. 605(c)(1).

[8] The background material in these paragraphs is drawn from the more extensive discussion in the *Report, supra* note 3, at table 1 and paras 29-30. *See also Second Report, supra* note 3, at table 1.

[9] Cinemax, also owned by HBO, scrambled its satellite feeds at the same time. A few pay per view services, with much more limited subscribership than HBO, had scrambled their signals with the VC II in late 1985. *Report, supra* note 3, at table 1.

[10] Comments of General Instrument Corporation in Gen. Docket No. 86-336 (*GIC Comments*) at 4 (filed Oct. 20, 1986).

[11] The investigation was conducted in cooperation with the National Telecommunications and Information Administration. *See Notice of Inquiry* in Gen. Docket No. 86-336. 104 FCC 2d 1444 (1986).

[12] *See supra* note 3. Pursuant to Commission instructions in the *Report*, Commission staff monitored the HSD market and produced three three-month progress reports on that market prior to the adoption of the *Second Report*. Since then, pursuant to Commission instructions, the staff has been monitoring the HSD market on an informal basis.

[13] *See Second Report, supra* note 3, at paras 16-17 and *Report, supra* note 3, at paras 39-52.

[14] In our earlier inquiry, proponents of a mandated standard argued that it was needed to ensure that consumers need purchase only one decoder and to hold decoder prices down. *See Report, supra* note 3, at paras 39-46. The relation between a standard and decoder prices is analyzed *infra* at paras 56-61.

[15] *Second Report, supra* note 3, at para 17.

[16] *Id.*

[17] *Second Report, supra* note 3, at paras 24, 79.

[18] Satellite Home Viewer Act of 1988, *supra* note 1, at 3959-60.

[19] *Communications Daily*, Nov. 22, 1988, p. 7.

[20] *Satellite Business News*, Feb. 8, 1989, p. 13.

[21] *Satellite Business News*, Jan. 11, 1989, p. 1. VC II modules are used by GIC and other manufacturers licensed by GIC to produce integrated receiver decoders (IRDs). An IRD is a satellite receiver (*i.e.*, a component of an HSD system) with built-in decoding capacity. GIC also produces standalone decoders. This total does not include all of the shipments by Channel Master, GIC's second source module licensee, but it appears that the excluded shipments are a small portion of the cumulative total reported.

[22] *Satellite Retailer*, February 1989, p. 10.

[23] *See Second Report, supra* note 3, at paras 24-33.

[24] *Satellite Business News*, Feb. 22, 1989, p. 13. GIC states that it offers compensation to victims of mistaken deauthorization, in the form of free programming or payment of shipping costs for decoders sent to GIC in response to mistaken deauthorization. *Id.*, Dec. 28, 1988, p. 13. Pirate decoders disabled by ECM can, in many cases, be restored to working order by purchasing additional pirate chips and/or software.

[25] The first improvement, new software referred to as "Dash 7," was introduced in late 1988. The second improvement, known as "chip-on-board," was introduced in early 1989. It involves a new configuration of circuitry in the VC II module. *Id.*, Dec. 28, 1988, p. 1, 13.

[26] *See Inside TVRO* (a GIC newsletter for satellite equipment dealers) Nov. 1988, p. 1, 2, 6.

[27] *Id.*

[28] Issues relating to the compatibility of the VC II and the VC II Plus, and to the transition from VC II to VC II Plus are considered *infra* at paras 27-31.

[29] These complaints were received prior to the initiation of the present inquiry. They were placed in the file of Gen. Docket No. 86-336 (the Commission's earlier HSD inquiry). These complaints, and others regarding encryption standards issues received after adoption of the *Second Report, supra* note 3, on February 25, 1988, are incorporated by reference into the record in this proceeding.

[30] Two other, less persuasive arguments were made by proponents of the proposition that a standard would lower decoder prices. It was asserted that a standard would rule out the possibility of multistandard decoders, which were claimed to be more expensive than single standard ones and it was asserted that the VC II had some unnecessary or duplicative features. *See Report, supra* note 3, at paras 39-45.

[31] In our earlier inquiry, we determined that the marketplace *had* adopted the VC II as a *de facto* standard. This determination, plus the conclusion that government-mandated standards would limit the incentives of manufacturers to develop improved encryption technology, led to our previous decision not to adopt mandatory encryption standards. *See supra* note 13. The effect of standards on innovation incentives is discussed *supra* at para 9 and *infra* at para 32.

[32] We seek information on the IRD share and its trend. Comments in our earlier inquiry suggested that the standalone decoder was a transitional product. *See Report, supra* note 3, at para 36.

[33] Our impression is that no one in the industry now believes that a consumer decoder can be built that is totally secure in the technical sense. It appears that the industry's hope now is for a decoder that is difficult and expensive to compromise, one that would, in effect, take the profit out of piracy. That, plus public relations and law enforcement efforts, in the view of the industry, will bring piracy under control, even if it is not eliminated entirely. *See Second Report, supra* note 3, at paras 29-31.

[34] Since every HSD household does not subscribe to every service, no programmer would be actually giving up 500,000 subscribers.

[35] *Broadcasting*, Dec. 5, 1988, p. 65.

[36] *Satellite Business News*, Dec. 28, 1988, p. 1, 13.

[37] *Id.*, p. 13.

[38] *See Tentative Decision and Further Notice of Inquiry* in MM Docket No. 87-268, 3 FCC Rcd. 6520 (1988).

[39] *See* Hearing on "H.R. 1885, the 'Satellite Television Fair Marketing Act'" Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce. 100th Cong., 2d Sess. (June 15, 1988). Prepared Statement of J. Lawrence Dunham, General Instrument Corporation *(Dunham Statement)* at 40-42.

[40] There are major technical and policy issues regarding availability of broadcast spectrum for ATV that have yet to be solved. *See Tentative Decision and Further Notice of Inquiry, supra* note 38. Spectrum for satellite transmissions is relatively abundant. Cable also has available the bandwidth needed for ATV.

[41] *See* paras 11-13 *supra*.

[42] *Dunham Statement, supra note* 39, at 29.

[43] We discuss the possible relation between standards and decoder prices in more detail *infra* at paras 56-61.

[44] *Dunham Statement, supra* note 39, at 38-40.

[45] In addition to being the primary manufacturer of VC II equipment, GIC also manages the center that handles authorization of subscribers to decrypt programming. *See Report, supra* note 3, at note 169.

[46] For these calculations to be completely accurate, it would also be necessary to know the breakdown of IRDs between those made by GIC and other manufacturers and the breakdown of modules used in IRDs between those manufactured by GIC and those manufactured by Channel Master.

[47] The complaint reproduced in Appendix A hints obliquely that GIC may be connected in some way to those who have compromised the VC II. The complaint contains no evidence that might corroborate such a connection, and we know of no evidence that would do so either. If any evidence or information on this matter is available, we urge commenters to submit it.

[48] Certain high value one-time pay per view events have been withheld from the dish market due to security concerns. *See, e.g., Satellite Business News*, Jan. 11, 1989, p. 4. *See also Id.*, Dec. 28, 1988, p. 4.

[49] *See* also paras 56-61 *infra*.

[50] We understand that the suggested retail price of a standalone consumer VC II unit is $395. The initial price for commercial units was "about $450." *See GIC Comments, supra* note 10, at 32.

[51] We realize that not all homes are passed by cable and that theft of services from cable operators is also possible. These factors mitigate the effect under discussion here.

[52] *Report, supra* note 3, at para 36. *Second Report, supra* note 3, at para 23.

[53] *Second Report, supra* note 3, at para 23.

[54] *Dunham Statement, supra* note 39, at 38.

[55] S. M. Besen and L. L. Johnson, *Compatibility Standards, Competition, and Innovation in the Broadcasting Industry* (Rand Corporation, 1986).

[56] *Id.*, at 61-71. The Commission decision process took place during 1983 and 1984. However, television stereo had been discussed in some earlier Commission decisions and had been addressed in petitions to the Commission prior to 1983. Hence, in this case, as in others, there is a certain amount of ambiguity in choosing the date on which Commission involvement in the process of deliberating on standards began. The involvement of the industry committee (the Broadcast Television Systems Committee of the Electronic Industries Association) in the analysis of television stereo sound standards dates back to 1979. Id., at 62.

[57] *Id.*, at 32-60. *See esp.* 34-39.

[58] *See Tentative Decision and Further Notice of Inquiry, supra* note 38, at paras 113-122.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-342

In re Applications of

OCEAN PINES FM PARTNERSHIP	File No. BPH-870331NQ
OCEAN PINES LPB BROADCAST CORP.	File No. BPH-870406KF
Malcolm Kahn, George V. Delson, Allen Skolnick & Saul Hertzig d/b/a OCEAN PINES BROADCASTING COMPANY	File No. BPH-870406KH
THE JOHNS HOPKINS BROADCASTING FOUNDATION	File No. BPH-870406MA

For a Construction Permit for a
New FM Station on Channel 246A
in Ocean Pines, Maryland

MEMORANDUM OPINION AND ORDER

Adopted: April 5, 1989; Released: April 13, 1989

By the Review Board: MARINO (Chairman) and BLUMENTHAL. Board Member ESBENSEN absent.

1. The Review Board has before it (1) a Petition for Extraordinary Relief, and (2) a Request for Stay, both filed March 24, 1989 by Ocean Pines LPB Broadcast Corp. (LPB or petitioner), directed toward those portions of a *Memorandum Opinion and Order* (FCC 89M-538, released February 16, 1989) (*Order*), issued by presiding Administrative Law Judge Edward J. Kuhlman (ALJ), and adding the following issue in the above-captioned case:

> To determine whether the findings and conclusions about the conduct of Leonard Berger, as a real-party-in-interest in *Key Broadcasting Corporation*, 3 FCC Rcd 6587 (ALJ 1988), should disqualify Ocean Pines LP Broadcast Corp.

The issue was added, [1] in response to an enlargement motion, following the release of the *Initial Decision* in *Key Broadcasting Corporation*, 3 FCC Rcd 6587 (1988) (ALJ). There, the presiding ALJ concluded that petitioner's 100% shareholder, Dr. Leonard Berger, was actually the real-party-in-interest in one of the competing applicants for the Fenwick Island facility, notwithstanding Dr. Berger's representation that he had been only an 80% "limited" partner, who later "divested" himself of his Fenwick Island interest in April 1987. [2] The Fenwick Island *Initial Decision*, and exceptions thereto (including exceptions to the real-party-in-interest issue), are currently pending before the Review Board. LPB contends that it is prejudiced by the addition of the issue(s) in the Ocean Pines proceeding "as framed and viewed" by the ALJ; and, therefore, it seeks a Board stay of the ALJ's interlocutory *Order*, pending the Board's resolution of the exceptions in the Fenwick Island proceeding. LPB represents that the Ocean Pines hearing is scheduled to commence on April 17, 1989. On March 30, 1989, an opposition to the requests for stay and for extraordinary relief was filed by Ocean Pines Broadcasting Company.

STAY

2. We will deny LPB's stay request. LPB has not met the stringent showings necessary for issuance of a stay set forth in *Virginia Petroleum Jobbers Ass' n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) and *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1971). [3] That is, it has not demonstrated that it would prevail on the merits or that a serious legal question has been presented. Second, it has not shown that irreparable injury would result from denial of its requested relief. It's claim that it would be subjected to unnecessary and additional litigation costs does not amount to judicially recognized irreparable injury. *See Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 24 (1974). Thus, this case is in sharp contrast to our recent holding in *Black Television Workshop*, FCC 89R-18, adopted March 23, 1989, *recon. dismissed*, FCC 89R-20, adopted March 24, 1989, where the petitioner might have been irreparably injured by denial of its requested relief, since it could only proceed with a proposed minority "distress sale" prior to commencement of the hearing. (Our action in that unique stay request case preceded, of course, the court's invalidation of the minority "distress sale" in *Shurberg Broadcasting of Hartford, Inc. v. FCC*, No. 84-1600, decided March 31, 1989.) No comparably compelling circumstances obtained here. Finally, issuance of a stay would not appear to be in the interests of the public or, more specifically, the other parties because of the unnecessary disruption and hearing delay that would result. *See Dorothy J. Owens, supra*, note 3; *High Springs Television, Inc., supra*, note 3.

PETITION FOR EXTRAORDINARY RELIEF

3. We will dismiss LPB's petition as an unauthorized pleading. Although styled a Petition for Extraordinary Relief, the petition is actually an appeal from an interlocutory ruling, and thus subject to the strictures of Section 1.301(b) of the Commission's Rules, 47 CFR §1.301(b). That subsection requires that such appeals may be filed only if allowed by the presiding ALJ; and here, LPB neither sought nor obtained the necessary consent from the ALJ. *See Federal Broadcasting System, Inc.*, 41 RR 2d 491 (1977)(dismissing appeal for lack of ALJ permission). LPB attempts to escape this constraint, however, by claiming that the ALJ's ruling "effectively" denied it's right to

participate as a party to the hearing, hence, bringing its petition under the purview of Section 1.301(a) of the Commission's Rules, 47 CFR §1.301(a), governing appeals as of right. This line of argument has been rejected in previous cases. *See George E. Cameron, Jr. Communications*, 48 RR 2d 1161 (1981)(rejecting appeal not terminating right of participation); *see also Magdalene Gunden Partnership*, FCC 86R-38, released June 10, 1986)(same).

4. Equally unavailing is LPB's contention that it has met the heavy burden set forth in *Communications Satellite Corp.*, 32 FCC 2d 533, 534 (1971). There, the Commission announced that it would not entertain interlocutory appeals, except:

> where it was shown that there has been a flagrant abuse of discretion as would inevitably require a reversal of the Initial Decision and a hearing *de novo;* or where the proceeding involves basic and far reaching consideration of public policy and vital concerns relating to the public interest which could not otherwise adequately be protected.

We find no such abuse of discretion here; indeed, we find the opposite. As petitioner itself observes, [4] the Commission's *Hearing Designation Order* in this very case took notice of the fact that a real-party-in-interest issue had been added against Dr. Berger's applicant in the Fenwick Island proceeding, the implication of 47 CFR §73.3518 (*see supra* note 1), and it added the following express condition [5]:

> [I]n the event a construction permit is awarded to [Ocean Pines] LPB as a result of this proceeding, its grant shall be without prejudice to whatever action, if any, the Commission may deem appropriate in light of the outcome of the issue.

And, as petitioner also recognizes, the ALJ presiding over the Fenwick Island proceeding resolved the real-party-in-interest issue adversely to Dr. Berger in that case. Consequently, the ALJ presiding in this instant Ocean Pines proceeding, where Dr. Berger is his applicant's sole principal, added the issue(s) discussed in paragraph 1, *supra*.

5. Unless and until the adverse resolution against Dr. Berger and his applicant in the Fenwick Island case is reversed or modified on appeal, the Ocean Pines ALJ was eminently correct in adding the subject issue(s) in this proceeding. As explained more fully in our recent memorandum in *Montgomery County Media Network, Inc., d/b/a Imagists*, FCC 89R-17, released March 29, 1989, the findings and conclusions regarding a particular party in one hearing proceeding are plainly relevant in another proceeding, where the parties and the issues are similar or interrelated. [6] After all, "[a]n initial decision is not a mere report to be arbitrarily disregarded." *Stereo Broadcasters, Inc.*, 74 FCC 2d 543, 545 (1979), *aff'd*, 652 F.2d 1026, 1030 (D.C. Cir. 1981). In some cases, in fact, the doctrine of collateral estoppel spares the necessity of relitigating the same matter heard before. *See RKO General, Inc.*, 82 FCC 2d 291, 312 (1980). Here, petitioner complains that language in the ALJ's *Order* adding the subject issue(s) in this Ocean Pines proceeding was so strong in questioning Dr. Berger's "trustworthiness," in light of the adverse findings and conclusions in the Fenwick Island proceeding, as to amount to predisposition. [7] It further, though somewhat inconsistently, complains that the issues(s) added by the ALJ in this Ocean Pines proceeding are so broad and "so far exceed the scope" of the real-party-in-interest issue in the Fenwick Island case as to constitute to a denial of due process. Further, claims petitioner, the issue(s) would "permit other parties to this [Ocean Pines] proceeding to introduce evidence and conduct cross-examination in this proceeding on matters far beyond the scope of the issues designated and determined in the Fenwick Island proceeding." [8]

6. We find no predisposition in the ALJ's language; only an intent to take full cognizance of the findings and conclusions reached, thus far, in the Fenwick Island case. [9] Should those adverse Fenwick Island findings and conclusions be reversed or modified on appeal, conforming action -- either by the Ocean Pines ALJ or by the appellate body having jurisdiction -- will assuredly be taken in this instant case. Because the Fenwick Island resolutions can be overturned or modified on appeal, the ALJ presiding in the instant case shall also make findings and conclusions with respect to petitioner's relative comparative standing, so as to avoid the need for relitigation of the comparative issue, should the Fenwick Island resolutions regarding Dr. Berger be found not to be disqualifying. *Cf. RKO General, Inc.* (WFYR-FM), 100 FCC 2d 464, 467-468 (1985)(comparative ranking by ALJ's ordered, pending resolution of license qualifications of another applicant). And, of course, our petitioner retains all of its appeal rights in the instant Ocean Pines proceeding, should it (or any party hereto) believe that the ALJ has erred in his hearing of this immediate case.

7. ACCORDINGLY, IT IS ORDERED, That the request for stay, filed March 24, 1989, by Ocean Pines LPB Broadcast Corp. IS DENIED; and that its petition for extraordinary relief, filed on the same date, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] The ALJ's *Order* also added an issue to determine whether LPB's application violates Section 73.3518 of the Commission's Rules, 47 CFR §73.3518, and should be dismissed. That rule prohibits inconsistent or conflicting applications. Here, the Fenwick Island and Ocean Pines applications have overlapping primary service areas. The Fenwick Island *Initial Decision* concluded that if the applications were inconsistent, it would be the latter-filed application that was inconsistent. The Fenwick Island ALJ, therefore, resolved the issue favorably to the Berger applicant. It is not clear from the pleadings whether LPB also objects to a hearing on this issue. In any event, our disposition on the real-party-in-interest issue would be equally applicable to the 73.3518 issue.

[2] Dr. Berger there claimed that he had sold his 80% equity interest in the Fenwick Island applicant for $10 (and "other considerations") to his special friend (and sometimes housemate), Sharon V. Lyon, a putative 9.99% equity owner of

that same applicant, 3 FCC Rcd at 6592, much as he had earlier "bonused" her the $6,000 FCC filing fee necessary to participate in that comparative hearing. *Id.* Dr. Berger was not the only principal to desert his Fenwick Island applicant: Alfred J. Stewart and Lester L. Green, alleged to have owned a combined 40% "voting" interest in Dr. Berger's Fenwick Island applicant, withdrew after felony convictions against them. Stewart was convicted of felony theft, and Green was convicted of violations of 18 U.S.C. §§2, 287, and 1001. *Id.*, at 6589-6590. Their convictions were not timely reported to the FCC.

[3] As we recently explained in *Black Television Workshop of Los Angeles, Inc.*, FCC 89R-20, adopted March 24, 1989, the Board possesses authority to hear appeals from the denial of stay requests. *See , e.g., Meridian Communications,* 2 FCC Rcd 5904 (Rev. Bd. 1987); *Tequesta Television, Inc.,* 2 FCC Rcd 5688 (Rev. Bd. 1987); *Dorothy J. Owens,* 104 FCC 2d 157 (Rev. Bd. 1986); *High Springs Television, Inc.,* 100 FCC 2d 247 (Rev. Bd. 1985); *Valley Broadcasters, Inc.,* 100 FCC 2d 522 (Rev. Bd. 1985). Here, it does not appear from the pleadings that LPB asked the ALJ to stay his ruling. We note, however, that LPB moved to modify the ALJ *Order,* but that motion was denied as an unauthorized petition for reconsideration.

[4] Petition for Extraordinary Relief at 5-8.

[5] *Id.*, at 5-6 (quoting *Hearing Designation Order).*

[6] In *Imagists,* the Board noted that the ALJ, the Board, and the full Commission had determined that a key principal in a Conroe, Texas applicant had been found to have misrepresented her role in the Conroe application, in a contemporary case. We therefore requested the parties to brief the question of whether the doctrine of collateral estoppel obtained. In the instant case, however, the adverse conclusions regarding Dr. Berger's role in the Fenwick Island proceeding are before the Board on exceptions to that *Initial Decision,* and are currently sub *judice.*

[7] Petition for Extraordinary Relief at 7-9.

[8] *Id.*, at 6-7.

[9] If it is ultimately held that Dr. Berger was an active party-in-interest in the Fenwick Island case, and not merely the "passive" investor he there alleged before his "withdrawal" from that applicant, his actions could well disqualify his Ocean Pines applicant as well. *See Massillon Broadcasting Co., Inc.,* 22 RR 218, 220-221 (1961) (real-party-in-interest added as disqualifying issue).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-389

In the Matter of

Revision of Part 15	RM-5193
of the Rules regarding	RM-5250
the operation of radio	RM-5575
frequency devices without an individual license.	

FIRST REPORT AND ORDER

Adopted: March 30, 1989; Released: April 18, 1989

By the Commission:

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INTRODUCTION

1. By this action, the Commission is amending Parts 2 and 15 of the Rules regarding the non-licensed operation of radio frequency (RF) devices and the equipment authorization procedures associated with this equipment.

The objective of this action is to achieve more effective use of the radio frequency spectrum while providing additional technical and operational flexibility in the design, manufacture and use of non-licensed devices. This objective will be achieved by: 1) providing for the production of equipment for non-licensed use on almost any frequency with minimal restrictions on usage, bandwidth, modulation technique and other technical parameters; 2) establishing uniformity among the technical standards for various non-licensed operations; 3) clarifying and simplifying our administrative requirements; and, 4) retaining, to the greatest extent possible, operations currently permitted under the rules.

BACKGROUND

2. The rules for non-licensed use of RF devices were established approximately fifty years ago. In 1938, the Commission allowed devices employing relatively low level RF signals to be operated without the need for individual licensing as long as their operation caused no harmful interference to licensed services and the devices did not generate emissions or field strength levels greater than a specified level. [1] Typical kinds of equipment operated under these regulations were wireless record players, carrier current communication systems and remote control devices.

3. At the time this standard was adopted, most Part 15 RF devices were designed to operate in the MF (0.3-3 MHz) and HF (3-30 MHz) frequency bands, and compliance was relatively easy to achieve. However, as the industry designed products intended for operation on higher frequencies, it became more difficult to meet the field strength limit specified in this early standard since the allowable field strength level decreased as the operating frequency increased. Accordingly, over the years the Commission amended and expanded Part 15 of the rules to permit the non-licensed operation of devices at higher frequencies in those cases where it could be determined that the mass-marketing of such products would not result in harmful interference to authorized radio services. In the 1950's, the Commission adopted new technical standards for devices such as radio receivers and low power transmitters operating in the 27 MHz band and above 70 MHz. In the 1960's through the 1980's, provisions were made under Part 15 to permit the operation of additional equipment such as wireless microphones, telemetry systems, garage door openers, TV interface devices (e.g., video cassette recorders), field disturbance sensors (e.g., anti-pilferage systems for retail stores), auditory assistance devices, control and security alarm apparatus, and cordless telephones.

4. The provisions for new devices generally were adopted in response to petitions for rule making that requested authorization only for the specific device in question. This incremental method of adopting device-specific regulations resulted in rules that are lengthy and difficult for the public to understand. It has resulted in the adoption of standards that are overly complex and, in some cases, unnecessarily restrictive. There are also a number of apparent inconsistencies in the technical standards between Part 15 devices that have similar interference potentials. Early standards adopted to control interference are frequently significantly different from what is needed at the present time due to improvements in equipment, such as receiver sensitivity, the increased proliferation of both licensed and non-licensed operations, and changes to the frequency allocations of authorized radio services.

5. The Commission believed it would be desirable to restore technical flexibility and administrative convenience to the regulations for RF devices operated without licenses and to modify and amend these regulations to address changes in the nature and number of such devices that have occurred in recent years. It therefore adopted the *Notice of Proposed Rule Making* (*Notice*) in this proceeding to consider a comprehensive revision of Part 15 of its rules. [2] The Commission received 340 comments and 56 reply comments in response to the *Notice*. [3]

DISCUSSION

I. GENERAL

6. In the *Notice*, the Commission proposed to revise and reorganize Part 15 of the rules in its entirety. The Commission sought to strike an equitable balance between the needs of the public for the services provided by non-licensed RF devices and the need to ensure that these devices do not cause harmful interference to licensed radio services. The major features of the proposed new rules for non-licensed RF devices were: 1) to allow manufacturers to produce non-licensed equipment for use on almost any frequency with minimal restrictions on usage, bandwidth, modulation technique and other technical parameters; 2) to establish uniformity between the technical standards for various non-licensed operations; 3) to clarify and simplify our administrative requirements; and, 4) to retain, to the greatest extent possible, operations currently allowed under the rules.

7. Many commenting parties agree with our tentative conclusion that there is need for a comprehensive revision of Part 15 of the rules and support the basic framework of our proposal for this revision. These parties represent a wide field of interests ranging from manufacturers of electronic equipment to licensees of authorized radio services. Supporting comments state that a comprehensive revision and modernization of the Part 15 rules is long overdue in light of the rapidly evolving capabilities of electronic technology.

8. Parties supporting our basic plan for revising Part 15 generally believe that the proposed rules would facilitate and encourage development and marketing of new types of Part 15 devices. They state that under the existing regulatory system, manufacturers often are reluctant to incur the legal expenses and delays associated with the rule making process in order to market a new product, especially when their competitors can manufacture similar products without expending resources on the regulatory process once the Commission adopts the rule changes requested in the petition. They state that the proposal to allow low power, non-licensed equipment to operate on most frequencies without prior FCC approval as long as the equipment meets the technical standards for the frequency on which it operates would eliminate these constraints, thereby affording manufacturers considerable new freedom and flexibility to design and introduce equipment for new kinds of services. RTT, EIA/CEG and others point out that the public's desire for low power, non-licensed RF equipment is evidenced by the veritable explosion of new and improved types of such products in recent years.

9. Almost all of the parties commenting on the general organization of the Part 15 rules state that the proposed changes would simplify these regulations and improve their internal consistency. Supporting parties also believe that the technical protections that would be provided by emissions limits, restrictions on use of specific frequency bands, and other technical standards as generally proposed in the *Notice* would ensure that Part 15 devices do not cause interference to licensed radio services. These commenting parties believe that the proposed revision of Part 15 would allow for expanded use of non-licensed products in a manner that would improve the quality of life for the American public without causing harmful interference to licensed radio communications services.

10. Many commenting parties, including most of those who specifically state that they favor the basic approach of the proposed revision, request modifications to specific aspects of these proposals. These requests generally pertain to individualized issues relating to the adequacy of the rules for protecting authorized services from interference from Part 15 devices or to the need for less stringent regulations in particular areas. The commenting parties address virtually all of the specific provisions of the proposed rules, seeking clarifications, changes in definitions, and modifications of technical standards, measurement procedures and other provisions affecting the applicability of the rules.

11. A number of parties representing the interests of authorized radio services and recognized "passive" radio uses, such as radio astronomy, oppose any restructuring or revision of the Part 15 rules that would encourage or facilitate the operation of significant numbers of low power, non-licensed RF devices or that would allow such devices to operate at higher emissions levels. These parties, who consist primarily of radio astronomers and amateur radio operators, are concerned that the proliferation of low power RF devices could increase the level of ambient RF "noise" and thereby disrupt reception of relatively low level radio signals or signals transmitted by licensed radio stations.

12. We continue to believe it is desirable and appropriate to restore the technical flexibility originally provided for operation of non-licensed RF devices in the Part 15 rules. The current system that requires rule making for authorization of new Part 15 devices imposes delays and costs on innovating parties that tend to have a chilling effect on the development and marketing of new products. This system is also unfair to innovating firms, in that once the rule making to authorize a device is completed, competing firms may then market similar products without incurring these regulatory burdens. We also find that the existing rules are overly complex and, in some places, are unclear such that it may be difficult for parties to determine whether a particular new device or modification of an existing device would comply with the rules. It is apparent from the record and from our own general observation of the market for electronic equipment that there is strong demand by the public for the types of devices that are typically authorized under Part 15. It is, therefore, all the more important that we make every effort to remove all regulatory constraints that may unnecessarily impede the market from introducing new RF devices. We believe that with proper technical and operational rules it is possible to provide for expanded operation of non-licensed RF devices while maintaining a satisfactory RF environment for operation of licensed radio services and recognized passive users of the radio spectrum.

13. Accordingly, we are adopting a comprehensive revision of the Part 15 rules that incorporates the basic framework proposed in the *Notice*. [4] The new rules are designed to provide a balance of our competing goals of eliminating unnecessary regulatory barriers and burdens on the development of new low power RF equipment and maintaining adequate interference protections for authorized radio services and recognized passive users of low level RF signals. We have attempted to eliminate all unnecessary and overly restrictive technical regulations. However, in some instances our decision to permit greater technical flexibility has necessitated that we adopt standards that are more restrictive than those of the existing Part 15 rules. In addition, we have also taken this opportunity to tighten the Part 15 technical standards to reduce interference to authorized radio services, in particular, the AM broadcast service.

14. In the sections that follow, we discuss each of the specific issues addressed in the *Notice* or raised by the commenting parties, present our decisions on these issues, and describe the specific provisions of the new rules.

II. DEVICES SUBJECT TO PART 15

15. The current Part 15 defines and regulates the emissions from "restricted radiation devices." This term is defined in the current Section 15.4(d) as "[a] device in which the generation of radio frequency energy is intentionally incorporated into the design and in which the radio frequency energy is conducted along wires or is radiated . . . " Several categories of restricted radiation devices, such as low power communication devices, field disturbance sensors, biomedical telemetry devices, computing devices, receivers, etc., are defined or discussed in the rules. Both devices that intentionally generate and radiate radio frequency energy, e.g., transmitters, and that intentionally generate but unintentionally radiate radio frequency energy, e.g., receivers and computers, are regulated as restricted radiation devices. A separate type of device which does not intentionally generate radio frequency energy but radiates radio frequency energy during the course of operation is defined as incidental radiators, e.g., electric motors, light dimmers, etc. No standards have been established for incidental radiators; however, these devices are permitted to operate only on a non-interference basis.

16. In order to simplify the technical requirements and to avoid confusion between the various types of devices, we proposed in the *Notice* to delete the definition of a restricted radiation device. That term would be replaced by new definitions recognizing the two basic types of devices operated under Part 15: intentional radiators and unintentional radiators. Intentional radiators would be defined as devices that intentionally generate and emit radio frequency energy by radiation or induction. Unintentional radiators would be defined as devices that intentionally generate radio frequency energy for use within the device, or that send signals by conduction to associated equipment via connecting wires, but which are not intended to emit radio frequency energy by radiation or induction. None of the comments opposed these proposed definitions. We continue to believe these definitional changes would serve to simplify the rules and reduce confusion with regard to determining the specific provisions of the

rules that are applicable to a given device. Accordingly, we are deleting the existing definition of restricted radiation devices and are adopting new definitions for intentional and unintentional radiators as set forth in Section 15.3 in Appendix B.

III. GENERAL TECHNICAL STANDARDS

17. The operation of radio frequency equipment used by the authorized services can be disrupted if that equipment receives undesired emissions. Part 15 devices have the potential to contribute to the undesired emissions that interfere with the satisfactory operation of authorized and recognized radio services. The emissions from a Part 15 device may be radiated over the air or conducted through the power line. As part of our plan to provide flexibility for the development of new Part 15 equipment, we are adopting technical standards that we believe will minimize the probability that harmful interference will be caused to the authorized radio services by Part 15 devices while still permitting effective economical operation of such devices in most frequency bands. These standards restrict the maximum levels of conducted and radiated emissions. They apply to both intentional and unintentional radiators. Additional protection to sensitive authorized services is provided by the establishment of various restricted frequency bands within which only spurious emissions from intentional radiators are permitted.

A. General Conducted Emission Limits

18. As indicated in the *Notice*, the current rules specify a number of different limits for conducted emissions depending on the type of Part 15 device. [5] In addition, the rules specify different frequency ranges over which these limits are to be measured. Consistent with our objective to eliminate, to the extent possible, device-specific regulations, we proposed to apply a single limit of 250 uV for all intentional and unintentional radiators, except for Class A digital devices. [6] This limit would apply over the frequency range 450 kHz to 30 MHz. We indicated that we believed such a limit would be sufficient to ensure that Part 15 devices do not cause interference to authorized services operating in that range irrespective of the type of modulation or emission used. We also proposed to measure line conducted emissions with the devices connected to the utility power service through a 50 ohm/50 uH line-impedance stabilization network (LISN), rather than a 50 ohm/5 uH LISN as provided in the current rules, and measurement instrumentation employing a quasi-peak detector function. [7] While the present rules require the use of a 50 ohm/5 uH LISN in some cases, it was felt that a 50 ohm/50 uH would provide better impedance matching and, therefore, more accurate measurements at frequencies below 10 MHz. The use of this value LISN would also conform with the American National Standards Institute (ANSI) Standard C63.4 and the standards recommended by International Special Committee on Radio Interference (CISPR). A few commenting parties object to the conducted limits proposed in the *Notice*. For example, TV receiver manufacturers indicate that even though the limit proposed to be applied to their equipment is a higher value than under the existing rules, the use of a 50 ohm/50 uH LISN and measurement instrumentation employing a quasi-peak detector results in a lower emission limit. The comments indicate that tighter limits are not required since TV receivers and similar devices have never been sources of interference. Other comments request an increase in the permitted levels for conducted emissions, especially for Class A digital devices. However, the comments submitted by individual operators in the Amateur Radio Service (ARS) and by individuals who regularly listen to international broadcast stations (shortwave) indicate that devices such as TV receivers and computers are major sources of interference in the frequency bands below 30 MHz and argue for more stringent conducted emissions limits.

19. The interference potential of Part 15 devices below 30 MHz is controlled principally by the limit placed on conducted emissions. We believe that the limits proposed in the *Notice* will provide sufficient flexibility to design cost-effective equipment. Further, based on past experience with these limits, we believe that they are sufficient to alleviate many of the interference problems currently being encountered. Therefore, we are adopting the limits which were proposed in the *Notice*. We are also adopting the use of the standard 50 ohm/50 uH LISN and the use of CISPR quasi-peak measurement instrumentation. Transition provisions have been provided for all present radio frequency devices. These transition periods will allow the manufacture and importation of equipment under the current rules for ten years for receivers and five years for other radio frequency devices. This should provide manufacturers ample time to make any needed changes to their equipment.

B. General Radiated Emission Limits

1. Radiated Emission Limits for Intentional Radiators

20. In the *Notice*, we proposed to permit Part 15 intentional radiators to operate without restrictions as to bandwidth, duty cycle, modulation technique or application as long as the equipment does not operate in certain restricted bands and it complies with the following general emission limits:

Frequency Band (MHz)	Field Strength (uV/m)	Measurement Distance (meters)
0.009 - 0.490	2400/F(kHz)	300
0.490 - 1.705	24000/F(kHz)	30
1.705 - 30	30	30
30 - 88	100	3
88 - 216	150	3
216 - 960	200	3
Above 960	500	3

The limits proposed were based on our experience as to the level that could be permitted without undue risk of interference to authorized radio services, the limits currently specified for Class B computing devices, and, for frequencies above 960 MHz, the recommendations of NTIA. At frequencies equal to or below 1000 MHz, we proposed to base the limits on CISPR quasi-peak measurements. Above 1000 MHz, we proposed to base the limits on peak measurements. We also proposed to limit spurious emissions from intentional radiators to the same levels as proposed for the general emissions limits.

21. A number of commenters support the concept of general radiated limits. GM, among others, indicates that the general limit will provide needed flexibility in the design of Part 15 devices. GM further notes that the licensed communications services have not been significantly impacted by the widespread proliferation of personal computers and other Class B computing devices that presently must comply with the proposed limits.

22. A number of objections to the proposed limits were also submitted. Several commenters, representing various authorized communications services, requested that the limits be modified to further protect their operations. The League indicates that its engineering analysis found that interference to amateur operations could occur at distances ranging from 78 meters (at 14 MHz) to 102 meters (at 28 MHz) from Part 15 devices operating at the proposed limits below 30 MHz. [8] Above 30 MHz, the League indicates that operation under the general limits could cause interference at distances ranging from 0.56 km (at 420 MHz) to 1.9 km (at 902 MHz). A number of commenters were concerned that Part 15 devices could interfere with the reception of International Broadcast (shortwave) stations. In addition, comments from individual amateur operators indicate that they have experienced interference from computing devices. EIA/LMRS submits that land mobile operations could receive interference from Part 15 devices operating under the general limits at distances ranging from 77 to 106 feet. NAB states that spurious emissions greater than the fundamental signal should not be permitted.

23. Manufacturers of Part 15 devices, on the other hand, express concern that the proposed limits are too low. GM requests an increase of 6 dB in the proposed limit below 1705 kHz for pulsed systems to compensate for the change in measurement technique from average to CISPR quasi-peak measurements. GM adds that while it realizes the Commission's desire to reduce interference to AM broadcast service, there is no compelling reason to reduce permitted emission limits below 490 kHz. LPB and other manufacturers of intentional radiators using the frequency band 510-1705 kHz and employing "leaky" coaxial cables as their antennas, object to the deletion of the current Section 15.7 of the rules. They further request that the field strength limit for such systems be made the same as that provided for Travelers' Information Stations (TIS) under Part 90 of the rules. [9]

24. We continue to believe that the proposed general radiated emission limits are appropriate for guarding against interference to authorized services by Part 15 devices. The limits for emissions between 1.705 and 30 MHz will provide essentially the same protection to authorized services as the existing rules. We observe that Part 15 devices already are permitted to operate in the 1.705-10 MHz band at higher limits without known interference problems to the authorized radio services. We also believe that interference distances calculated by the League and others for frequencies below 30 MHz are overly optimistic and that the actual potential for interference from Part 15 devices is significantly less. This is due to the high background noise levels and the large number of authorized high power stations below 30 MHz. In this regard, we note that the majority of Part 15 devices operating on frequencies between 1.705 and 30 MHz are field disturbance sensors for control of entry into buildings or tag sensors for deterring shoplifting that have an effective range of a few feet and normally are used in buildings that attenuate the range of the emissions. Thus, the risk of interference to shortwave broadcasts and ARS transmissions by Part 15 devices operating below 30 MHz at the new emissions levels appears to be very low.

25. The proposed general limits in the band 30-960 MHz band are the same as the limits currently applied to Class B computing devices. The claims of computer interference from individual ARS operators are not persuasive enough to warrant more stringent limits. For example, they do not indicate if the reported interference resulted from a computer co-located with the equipment receiving interference, if the source of the interference was a Class B (residential) computer, or if the computer was in compliance with our technical standards. Moreover, as stated by GM, licensed communications have not been significantly impacted by the widespread proliferation of Class B computing devices. On this basis, we continue to believe that the proposed rules for the 30-960 MHz range are adequate to guard against significant interference to authorized services from Part 15 equipment.

26. For frequencies above 960 MHz, the proposed limit is the same as that which the Commission recently adopted in GEN Docket No. 86-422 to ensure that emissions from Part 15 devices do not interfere with safety and other sensitive services operating on the exist [10] In view of the Commission's finding that this limit is adequate for protecting sensitive services from interference by Part 15 operations, we believe this same limit also is appropriate to minimize the probability of interference by Part 15 devices to any authorized service above 960 MHz.

27. We are, however, amending our proposal with regard to the measurement of radiated emissions. As discussed below in paragraphs 91-95, we are requiring that emissions be measured using the quasi-peak detector function for frequencies below 1000 MHz and the average detector function, with a corresponding limit on peak emissions, for frequencies above 1000 MHz. We are also requiring that peak emission limits apply to some pulse modulation systems that employ a low pulse-repetition frequency. However, in response to GM's concerns we will continue to permit the operation of devices on frequencies below 490 kHz under the existing emission limits, including the use of measurement instrumentation employing an average detector. As with other frequency bands for which we are retaining average measurements, we are adopting a corresponding limit on the level of emissions measured with instrumentation with a peak detector. That peak limit is 20 dB above the maximum permitted average emission level. The addition of this limit on peak emission levels will reduce the potential for interference to the authorized services, especially from Part 15 devices employing pulse modulation techniques. A similar change in measurement technique is not being provided for other bands under the general emission limits. First, while the general limits for the band 0.51-1.705 MHz are the same as the existing limits, except for the method of measurement, we believe that the use of CISPR quasi-peak measurement techniques is needed to provide additional protection from interference to the AM broadcast service. Second, the general limits above 1.705 MHz are new standards. Thus, we believe that the additional protection from interference to the authorized services afforded by the use of CISPR quasi-peak measurement techniques is appropriate for these bands.

28. Some manufacturers of intentional radiators employing "leaky" coaxial cables as antennas are under the impression that such systems are subject to Section 15.7 of the Commission's current rules. This is not the case. Rather, these devices are subject to the provisions of Section 15.111 and also the equipment authorization requirements provided in the existing Section 15.131. As stated in OST Bulletin No. 63, "[a] communication system where a wire is routed through [an] area and connected to a transmitter for the express purpose of

radiating a signal into space is not considered to be a carrier current system and Section 15.7 does not apply. Such a system is considered to be a low power communication device and the wire is treated as an antenna." [11] We concur with this interpretation of the rules. We also are rejecting the request of these parties for an increase in the permissible power level for these devices to the same level authorized for Travelers' Information Stations. Operation of a Travelers' Information Station is conducted under a license issued by this Commission. The licensees in this service are known to the Commission and can easily be identified should interference occur. Moreover, the licensing process requires coordination with other users of the spectrum to avoid potential interference problems. To permit leaky cable transmission systems operating without a license under Part 15 to transmit at higher power levels would undermine our system for avoiding interference to licensed stations.

29. Finally, we agree with the comment from NAB that it is necessary to subject spurious emissions from intentional radiators to more stringent control than our proposal in the *Notice*. We are concerned that our proposal to limit spurious emissions to the same levels provided in the general emissions limits would serve to permit excessive levels of unnecessary emissions that would further increase the level of background RF noise. We note that spurious emissions do not contribute to the transmission of information between RF devices. Accordingly, the new rules will preserve the policy in the current rules that restricts spurious emissions from Part 15 devices to a level not in excess of the device's fundamental emissions.

2. Exceptions to the General Limits

30. The present rules permit Part 15 intentional radiators to operate in a number of frequency bands at field strength levels greater than the general emission limits. To the greatest extent possible, we proposed to retain these exceptions and, at the same time, to delete certain operating restrictions. For example, we proposed to remove the bandwidth and channelization requirements in the 27 MHz and 49 MHz bands. Further, we proposed to delete the requirement to use a microphone as an input source for transmitters in the 88-108 MHz band. We are retaining provisions for certain specific devices that operate at higher field strengths but are less likely to cause interference due to limited numbers of units in operation and the nature of the areas in which they are operated. [12] The following paragraphs contain discussions of the comments received regarding existing Part 15 operations.

31. *Operation in the Bands 160 - 190 kHz and 510 - 1705 kHz*. The *Notice* did not propose any changes to the existing operations permitted in the frequency bands 160-190 kHz and 510-1705 kHz. Several comments were received with regard to operation in these bands. ANARC and others request that the Commission permit increased power, e.g., up to 20 watts, larger antennas, and an expansion of the permitted band of operation to 130-190 kHz due to interference being received from the Ground Wave Emergency Network (GWEN). [13] Several comments request that the permitted power level be increased up to one watt in the band 510-1705 kHz along with an increase in the permitted maximum length of the antenna. They allege that permitting an increase in power and length of the antenna would not result in interference to the authorized services, particularly AM broadcast stations, since AM stations and other users transmit at much higher power levels than permitted under Part 15.

32. While the requested increases in power and antenna size would make Part 15 operations more reliable, such increases could result in increased interference to the authorized services such as AM broadcasting. Interference is not dependent solely on the transmitted power levels. Rather, interference is based on the field strength levels of the received signals, both desired and undesired. The propagation characteristics of these bands could result in the reception of high field strength levels from the Part 15 devices, creating interference to the authorized radio services. Further, an expansion of the permitted frequency band 160-190 kHz could cause interference to the International Fixed Public Radiocommunication Services operating under Part 23 of our rules. Because of the possibility of this increased potential for interference, the requested changes are not being adopted.

33. *Operation in the Bands 27 MHz and 49 MHz*. The *Notice* proposed to expand the frequency band at 27 MHz to include 26.96-27.28 MHz, to delete the prohibition against voice or continuous wave (CW) transmissions in the 27 MHz band, and to delete the present channelization and bandwidth limitations in both the 27 MHz and the 49 MHz bands. [14] The permitted field strength levels would remain as specified in the current rules, i.e., 10,000 uV/m at 3 meters, except that they would be based on CISPR quasi-peak measurements.

34. GM, in its comments, requests that a 6 dB increase be provided for pulsed systems to compensate for the change from average to CISPR quasi-peak measurement techniques. We agree with GM that the emission limits for these bands should be changed to accommodate existing systems. Accordingly, we are retaining average measurements for radiated emissions for operations in the 27 MHz and 49 MHz bands, as well as other bands in which operation currently is permitted under Part 15. However, in order to ensure that excessive peak levels from pulse modulated systems do not cause interference to authorized operations, we are adopting concurrently a limit on the peak level of radiated emissions that is 20 dB above the maximum permitted average limits.

35. *Perimeter Protection Systems*. Under the current rules, perimeter protection systems operate within the frequency bands 40.66-40.70 MHz, 54-72 MHz and 76-88 MHz. The maximum permitted field strengths of the radiated emissions are specified at 30 meters. In the *Notice*, the Commission proposed to delete the specific provisions for perimeter protection systems in Section 15.310 of the rules. [15] These provisions were to be replaced by a new section that would limit emissions in the frequency band 40.66-40.70 MHz to 1000 uV/m at 3 meters, e.g., 20 dB higher than the general emission limit for other frequencies in the 30-88 MHz band, and provide technical standards for frequency control for devices operating in this band. The *Notice* also proposed to retain the existing emission limits for the 54-72 MHz and 76-88 MHz bands. These limits are the same as the new general limit; however, the new limit would be specified at 3 meters whereas the existing limit is specified at 30 meters. We also proposed to delete the requirement that spurious emissions from these devices be attenuated below the fundamental emission.

36. Comments from the manufacturers of perimeter protection systems object to our proposed application of CISPR quasi-peak measurements; the distance at which the measurements would be made, due to near field effects; and, the requirement to use buried cables for perimeter protection systems. GM, Senstar and Stellar request an increase in the permitted field strength limits to compensate for the change to CISPR quasi-peak measurements.

37. In response to the comments, we note that the proposed new limit in the band 40.66-40.70 MHz represents a 6 dB increase above the level currently permitted for perimeter protection systems. This 6 dB increase will offset the change from CISPR quasi-peak measurements and guard against interference to authorized services. None of the comments requesting a higher field strength limit in the 40.66-40.70 MHz band to offset the change to CISPR quasi-peak measurements provided information to demonstrate than an increase in the emission limit above that proposed would not cause interference to the authorized services. The application of CISPR quasi-peak measurements will prevent manufacturers from shortening the duty cycle of the signal to increase the power of the transmitter while staying within the field strength limits. Such additional interference protection is needed as this band will no longer be limited to perimeter protection systems. Rather, this band now will be available for any type of operation. Thus, we are denying the requests to further increase the emission limit in the range 40.66-40.70 MHz to compensate for the change to CISPR quasi-peak measurements. We are retaining the existing emission limit on the fundamental frequency for perimeter protection systems in the frequency bands 54-72 MHz and 76-88 MHz, as proposed. We conclude that the general emission limit for the 30-88 MHz band is also appropriate for operation in these bands. CISPR quasi-peak measurements are currently required for these devices.

38. As proposed, the new rules standardize these field strength limits at a distance of 3 meters and permit measurement at a greater distance than this in order to avoid near field measurement problems. Further, the current requirement for perimeter protection systems to use buried cables has been deleted from the regulations. As long as the emission limits are not exceeded, it does not matter whether the radiating sources employed by perimeter protection systems are buried or are above ground. However, in order to limit the potential for interference to the reception of television broadcasts, we are retaining the existing regulations concerning the frequency bands of operation and the requirement that perimeter protection systems be used in industrial, business and commercial applications.

39. As a separate issue dealing not with the standards but with the method of measurement, CDC, in its reply comments, requests that the Commission permit the manufacturers of perimeter protection systems to perform initial measurements at the antenna terminals since the signal levels are so low that they are below the background noise limit. While the radiated field strength of the fundamental emission would still be measured, only those spurious emissions that exceed a certain value, based on measurements taken at the antenna terminals, would be required to be measured at the installation site, i.e., field strength measurements would be determined only for the fundamental emission and the spurious emissions so indicated. In this manner, the number of spurious emissions for which the field strengths would be measured can be reduced along with a corresponding reduction in testing time and expense. In considering CDC's suggestion, we note that the rules, as proposed, will permit the use of alternative measurement techniques. While CDC's proposed measurement technique may be useful in many applications, we do not find it desirable to incorporate this approach into the rules as a general measurement policy. The acceptability of this and other alternative procedures will continue to be judged on a case-by-case basis.

40. *Control and Security Alarm Devices and Other Periodic Operation.* In the *Notice*, we proposed, in general, to retain the current regulations regarding control and security alarm devices and other periodic transmitters. The major proposed change was to limit peak emissions to no more than 20 dB above the permitted average emission limits. In addition, emissions appearing within the restricted frequency bands would be measured using the CISPR quasi-peak detector function, as specified for other Part 15 devices. All other radiated emissions limits would continue to be measured using the average detector function. [16]

41. The comments request that the limits on peak emissions, spurious emissions and fundamental emissions in the ISM bands be relaxed. Genie and other manufacturers of garage door openers object to limiting peak emissions to no more than 20 dB above the average limits. Genie also requests that spurious emissions be required to be attenuated no more than 10 dB below the level of the fundamental emission. CORF, on the other hand, requests that the limits on spurious emissions be reduced to the general emission limits due to the proliferation of control and security alarm devices. For example, this could reduce the limit from a maximum of 1,250 uV/m to 500 uV/m in the bands above 960 MHz. NAB requests that spurious emissions that fall within the FM radio band, 88-108 MHz, be reduced to 100 uV/m at 3 meters. Similarly, they request that emissions that fall within the band 130-174 MHz be reduced to 100-375 uV/m, based on a linear interpolation, at 3 meters. NAB states that these limits will provide greater protection to FM and TV.

42. We continue to believe that a limit on peak emissions is necessary for control and security alarm devices and other periodic systems. The transmission of excessive peak levels of emissions increases the probability that interference will be caused to the authorized services. Further, recent advances in technology permit the inexpensive application of modulation techniques with very high peak to average ratios. Such emissions could likely be a potential for harmful interference. To avoid interference that could result from use of this technology, we are imposing the same limit on peak emissions of no more than 20 dB greater than the specified limit on average emissions on control and security alarm devices and other periodic operations that we are applying to all other Part 15 devices for which an average emission limit is specified. This limit should accommodate the vast majority of devices being manufactured and should ensure that the potential for interference to the authorized services is minimized.

43. We find that additional attenuation requirements for spurious emissions are not required to control interference potential from control and security alarm devices and other periodic transmitters. The limits on spurious

emissions are the same as required under the present regulations. The comments provided no information to persuade us that additional attenuation is needed. Therefore, we are retaining the existing regulations for spurious emissions from control and security alarm devices and other periodic transmitters; provided, however, that spurious emissions need not be attenuated below the general emission limits.

44. *Cordless Telephones and Other 49 MHz Transmitters.* The *Notice* proposed that field strength limits for cordless telephones be based on CISPR quasi-peak measurements. The *Notice* also proposed to tighten the limit on spurious emissions for cordless telephones and proposed to eliminate the existing requirement that cordless telephones be self-contained. This latter provision would allow the use of external inputs for additional features such as computer modem connections. Finally, for devices other than cordless telephones operating in the 49 MHz band, the *Notice* proposed to delete the channelization and bandwidth limits.

45. The comments generally oppose the proposal to tighten the spurious emission requirements for cordless phones. A number of the comments point out that such a change would significantly increase the cost and complexity of cordless phones and are unnecessary. AT&T, in its comments, suggests that the attenuation of spurious emissions be based on the maximum permitted field strength instead of the actual field strength, resulting in a limit of 500 uV/m at 3 meters. Most commenters support our proposal to delete the requirement that cordless telephones be self-contained. AT&T and OCI object to allowing the attachment of modems to cordless telephones. They state that allowing modems to be connected could encourage long transmission times which could disrupt service for other users of cordless telephones. Other commenters object to the proposal for general operation within the frequency band 49.82-49.90 MHz. They indicate that this would increase the possibility of interference to cordless telephones. AT&T states that a single 49 MHz transmitter could cause interference to multiple cordless telephone channels. [17] EIA/PCS and AT&T also request that "baby monitors" operating in this band be required to be voice activated or to incorporate timers to reduce the interference potential to cordless telephones. These "baby monitors" are wireless intercom systems that are marketed primarily for the purpose of monitoring a nursery.

46. We agree with the comments that the proposed requirements for attenuation of spurious emissions from cordless telephones would be overly burdensome. We do not agree, however, that the attenuation of spurious emissions should be based on the maximum permitted field strength. First, the 26 dB attenuation points define a close approximation to the occupied bandwidth, and the maximum occupied bandwidth for cordless telephones remains at 20 kHz. Thus, the 26 dB attenuation points must still be met for emissions removed more than 10 kHz from the carrier to show compliance with the bandwidth limits. Second, as indicated earlier, spurious emissions do not contribute anything to the transmission of information. Spurious emissions serve only to pollute the spectrum, reducing its availability to other users. No indication has been provided that the manufacturers have any difficulty complying with the existing limit or that this limit could be relaxed without increasing the potential for interference. Accordingly, the proposed changes will not be adopted and we will retain the spurious emission attenuation requirements specified in the current regulations, e.g., emissions removed from the center of the transmission by 10-20 kHz must be attenuated by 26 dB. Further, since transmitters, other than cordless telephones, operating in the 49.82-49.90 MHz band are similar to the transmitters used as cordless telephones, we are amending the regulations to specify the same limit on unwanted emissions as applied to cordless telephones. We are retaining the existing specification that radiated emissions from cordless telephones and other 49 MHz transmitters be based on measurements with an average detector and are adopting a corresponding limit on peak emissions that is 20 dB above the maximum permitted average limit. Since cordless telephones currently use frequency modulation and it does not appear that any other 49 MHz transmitters exceed the current emission limit by more than 20 dB on peak emissions, this should not result in any changes being required for present equipment. Since the changes in the rules applied to cordless telephones and other 49 MHz transmitters are not as extensive as those proposed in the *Notice*, the long transition period proposed in the *Notice* is not needed.

47. As to the objections to allowing the connection of modems to cordless telephones and the operation of other Part 15 devices such as "baby monitors" on the 49 MHz band, we again point out that no protection from receiving interference is provided to Part 15 devices, regardless of the source of interference. Thus, there is no basis for prohibiting the connection of modems to cordless telephones or for restricting the operation of other Part 15 devices on the 49 MHz band. These changes to the regulations will be adopted as proposed. We are cognizant however of the large number of people who have come to depend on cordless telephones for many communications needs. Thus, we intend to consider addressing a possible reduction in the permitted field strength limits for operation of devices other than cordless telephones within the frequency band 49.82-49.90 MHz in a subsequent Notice of Proposed Rule Making.

48. *Operation in the FM Broadcast Band.* The *Notice* proposed to delete the requirement to use a microphone as an input source for intentional radiators operating in the FM broadcast band, 88-108 MHz, and to specify the field strength limits for such devices at a distance of 3 meters. NAB requests that the FM band be designated as a restricted band and that Part 15 devices not be permitted to operate in the band. Alternatively, NAB requests that the maximum permitted field strength be reduced to 150 uV/m at 3 meters. Further, it states that it does not agree with the proposed limit on spurious emissions of 150 uV/m at 3 meters. Radio Listed Services requests that the emission limits for Part 15 devices operating in the FM broadcast band be increased to 400 uV/m at 15 meters to provide an operating range of about 800 feet.

49. We disagree with NAB's position that Part 15 devices should be restricted from operation in the FM radio band or subject to restrictions on radiated emissions more stringent that those currently in place. Indeed, transmissions within the FM broadcast band are not as susceptible to receiving interference as transmissions in the AM and TV broadcast bands. With a frequency modulated signal, the receiver will tend to pick up only the strongest signal. Due to this "capture effect", an FM broadcast receiver requires that the desired signal be only about 2 dB above the level of the undesired signal on the same frequency in

order to be received without interference. Thus, a Part 15 intentional radiator could transmit, in most circumstances, on the same frequency as that used by a local broadcast station without mutual interference being caused, provided the power from the Part 15 transmitter is kept low. A Part 15 transmitter operated in this manner would be severely limited in range, and it is only within that range that interference to the reception of the FM broadcast station would be encountered. If the power level for Part 15 transmitters in the FM band were allowed to increase, as requested by Radio Listed Services, the range at which interference to the FM broadcast stations could occur would also increase. For these reasons, we will not accede to requests by the commenters that the emission limits for operation in the FM broadcast band be changed or that the FM broadcast band be restricted. Thus, the new rules will not include special provisions for Part 15 devices operating on frequencies in the 88-108 MHz band. However, we are retaining the current Section 15.175 of the regulations to permit the continued operation in this band by educational institutions of custom built telemetry devices used for experimentation without the need to obtain a grant of equipment authorization. These existing provisions were inadvertently omitted from the *Notice*

50. *Operation in the TV Bands.* We are satisfied that our proposed general emission limits are adequate to prevent harmful interference to TV receivers from Part 15 transmitters operating in the television broadcast bands. Of great concern, however, is the more intensive use of these bands that may occur with the introduction of various forms of High Definition Television (HDTV). We note that the comments in this proceeding recognize the potential impact of Part 15 devices on the development of HDTV. The Commission has already taken steps to protect the television bands by delaying further consideration of its proposals for land mobile licensees to share spectrum in the UHF band pending the outcome of the inquiry into HDTV. We believe that, here too, prudence dictates a conservative approach. For this reason, at the present time, we are not allowing intentional radiators operated under the general limits to have their fundamental emissions located in the frequency bands allocated to television broadcast stations.

51. At the same time, we see no necessity to prohibit the continued operation of those devices already placing emissions in the television bands. Periodic transmitters have been permitted in these bands for years. They operate intermittently and have not been a source of interference. It would not serve the public interest to remove them now. Similarly, we permit the operation of perimeter protection systems for commercial premises in the television bands. We anticipate little difficulty from such devices and will permit them to remain. Unintentional radiators, e.g., receivers, have long been permitted to radiate in the television bands, at considerably higher levels than the general limits we are adopting today. As explained in paragraphs 79-82, these devices will be expected to decrease the level of their emissions over time. Spurious emissions from intentional radiators will be permitted in the television bands at the general limits. The level of spurious emissions and emissions from unintentional radiators can generally be expected to be much lower than the fundamental signals of transmitters. Thus, their interference potential is not as great.

52. *Field Disturbance Sensors above 900 MHz.* By proposing to require CISPR quasi-peak measurements below 1000 MHz and peak measurements above 1000 MHz, the *Notice* effectively proposed to change the emission standards applicable to field disturbance sensors. In comments addressing this proposal, Allen-Bradley requests that field disturbance sensors continue to be subject to average emission measurements for all frequencies. Allen-Bradley also requests that an allowance for peak emissions up to 20 dB above the average limits be permitted to accommodate field disturbance sensors that use pulsed emissions. Gillespie, Prudhon & Associates, Inc. and Wilkens Engineering request increased power levels for field disturbance sensors, up to as high as one watt. As discussed in paragraph 94, we concur with the comments from Allen-Bradley and are retaining the specification of average emission limits with a corresponding limit on peak emissions equal to 20 dB above the maximum permitted average limits. The combination of average and peak emission limits is sufficient to control potential interference. We are not adopting the proposal from Gillespie, Prudhon & Associates, Inc. and Wilkens Engineering to permit field disturbance sensors to operate at higher power levels. Their comments did not provide justification for this power level and did not provide any indication that such higher power levels would not result in interference to other radio services.

53. *Cable Locating Equipment.* Cable locating equipment[18] currently is regulated under the provisions of Section 15.7 of the rules. In view of the proposed deletion of Section 15.7, the regulations proposed in the *Notice* would have required cable locating equipment to meet emission standards similar to those in the current Section 15.111, along with additional requirements such as certification of the transmitter and operation with an antenna of the type provided by the grantee. A number of comments suggest changes to these standards. The Fisher Research Laboratory suggests that we define cable locating equipment as test equipment, exempt from the regulations; define the pipes and cables as not constituting antennas; provide alternative specifications such as a maximum input power of one watt with the frequency band restricted to 70-90 kHz and 160-190 kHz; or, require testing at three typical installations for certification. Dynatel requests the Commission to place cable locating equipment under the verification procedure and to implement standards based on power output, limiting output power to no more than one watt over the frequency band 45-490 kHz and ten watts over the frequency band 9-45 kHz. Dynatel states that ten watts at the lower frequency range is needed to permit the location of long fiber optic cables. Metrotech filed similar comments but requests that an output power of 50 watts be permitted to allow the location of 40 mile long fiber optic cables buried five feet deep.

54. Cable locating systems do not appear to have ever been a source of radio frequency interference in the many years that they have been operated. These devices are used intermittently and for relatively short periods of time. Thus, the Commission agrees with Dynatel that these devices should be authorized under our verification procedure. Further, because the electrical properties of the pipe or cable that is used as the "antenna" cannot be known in advance of each use of the detection equipment, the level of the radiated field strength will vary with each use of the equipment. For this reason, we agree

with the comments that a limit on maximum output power over a specified frequency range is a more appropriate standard for this type of equipment. Accordingly, we are adopting a power output limit of 10 watts over the frequency range 9-45 kHz and one watt over the frequency range 45-490 kHz, as proposed by Dynatel. In addition, we are requiring cable locating equipment to comply with the AC power line conducted emission limits for those devices that connect to the AC power line.

3. New Bands

55. In the *Notice*, we proposed to authorize the operation of Part 15 devices on a number of new frequency bands, namely the frequency bands allocated to industrial, scientific and medical (ISM) devices, [19] at higher emission levels. These frequency bands are: 13.553-13.567 MHz, 26.96-27.28 MHz, 40.66-40.70 MHz, 902-928 MHz, 2400-2483.5 MHz, 5725-5875 MHz, and 24.0-24.25 GHz. As under the general limits, operation within these bands would not entail restrictions on channelization, bandwidth, type of modulation, or type of operation. The Commission stated that establishment of these new bands would enable manufacturers to introduce new equipment providing major benefits to consumers and to take advantage of new technologies without the need for Commission rule making.

56. A number of commenters object to permitting the operation of Part 15 devices on ISM frequency bands. FAA indicates that allowing operation of Part 15 devices on the ISM bands is a disservice to the public, as there are many Government and commercial operations with high powered transmissions within and adjacent to these bands. FAA states that ISM bands allocated to the government should not become locations for concentrations of Part 15 devices. Other comments, such as those of Allen-Bradley and GE, express the belief that such a large number of Part 15 users might operate on the ISM bands that the Commission might decide to implement restrictions on authorized ISM users to protect the operators of Part 15 devices from interference. The League and individual ARS operators object to allowing Part 15 devices within ISM frequency bands allocated to the Amateur Radio Service, citing the possibility of interference both to and from Part 15 operation. [20]

57. GM, on the other hand, supports the use of the proposed new bands by Part 15 devices. GM states that the FCC should leave the decision of whether any high power transmission, be it from ISM equipment, U. S. Government systems, or amateur radio, will cause interference to a Part 15 device to the manufacturer and its engineering staff. SEIA, in its comments, states that Part 18 devices are allowed unlimited radiation in the ISM bands, and, since both Part 18 and Part 15 devices are regulated to protect authorized services, these devices should be treated similarly with respect to emission limits. Other comments from the manufacturers of control and security alarm devices request that a new classification be established under Part 15 to permit higher emissions levels for Part 15 devices located in industrial, commercial or business establishments. They indicate such an approach would be similar to the differentiation between Class A and Class B computers. [21] In support of this approach they indicate that spurious emissions from transmitters in the authorized radio services are now permitted at higher levels than emissions from Part 15 devices. NTIA responds to these comments by stating that the number of transmitters in the authorized services is a small fraction of the number of Part 15 devices. NTIA also states that interference from a licensed transmitter generally can more easily be traced and eliminated than interference from Part 15 devices because the frequency and location of a licensed station are ordinarily known, whereas it is more difficult and expensive to locate and eliminate a multitude of Part 15 devices.

58. We continue to believe that there are many possible applications for Part 15 devices within these ISM bands. The fact that these frequencies may not be suitable for certain consumer devices is not a reason to prohibit Part 15 operation. We note that presently there are many Part 15 applications that are tolerant of interference or isolated from potential interference sources. We believe that manufacturers, if given the opportunity to use the ISM frequencies, will develop many new and practical uses of Part 15 devices. Thus, we will not restrict the use of these bands by Part 15 equipment because of the possibility of interference to that equipment by equipment operating under other rule parts.

59. We also believe that the probability that Part 15 operations will cause interference to authorized services in the ISM bands above 900 MHz is low. First, the rate at which radiated emissions are attenuated, especially from intervening objects, is quite high in these bands. Second, the potential for the Part 15 device to receive interference is much greater than the potential for the Part 15 device to cause interference. Because of the possible applications which exist for viable uses of these bands, the proposed rules are being implemented.

60. As for requests from SEIA that Part 15 devices be permitted to operate with additional field strength in the bands allocated for ISM operation under Part 18, we note that Part 18 is an authorized service. Part 18 devices are permitted to radiate without a limit on the level of radiation only in those frequency bands in which ISM operation is the primary authorized service. Part 18 devices operated in this manner are not required to provide any protection from interference to other authorized services located within the ISM bands. For this reason and the potential for such Part 15 devices to cause interference to authorized radio services located in the ISM bands, we are denying SEIA's request. Further, we find that the request by the manufacturers of control and security alarm devices to establish a special classification under the Part 15 rules permitting higher emissions is beyond the scope of this proceeding. We also note that, in many instances, the need for higher emissions levels can be met through operation under one of the authorized services. In view of the absence of interference protection for Part 15 devices, it would appear that, wherever possible, operation under the authorized services would be preferable to operation under the Part 15 rules. We therefore encourage parties with need to operate RF equipment at higher emissions levels than those permitted herein to seek authorization under other provisions of our rules.

4. Restricted Bands

61. *Frequency Bands Designated as Restricted.* In the *Notice*, we proposed to prohibit the operation of Part 15 intentional radiators on the frequencies used by certain sensitive radio services, i.e., frequency bands allocated for services involving safety-of-life or for services that utilize very low received signal levels. [22] These proposed restricted bands were coordinated with the NTIA prior to

the release of the *Notice*. Only spurious emissions at or below the general field strength limits would be permitted within these bands. We also questioned the need to establish or maintain restricted bands for transmitters operated below 70 MHz. We indicated that it appeared that the proposed general limits below 70 MHz would be sufficiently low to provide adequate interference protection for sensitive services without the need for restricted bands.

62. A number of commenting parties request that other frequency bands be specified as restricted bands in addition to those proposed in the *Notice*. USCG, NTIA, and several others propose that the Loran C radionavigation band, 90-110 kHz, be designated as restricted. NTIA also requests that these bands be restricted: 1) 162.0125-164.43 MHz, 164.72-166.73 MHz, and 167.72-173.2 MHz, for wind shear detection around airports and to warn pilots when emergency action is needed, for protection of national and visiting foreign dignitaries, and for tracking of wildlife; 2) 821-824 MHz and 866-869 MHz, for nationwide common spectrum for Federal, state and local disaster relief teams, hospitals, emergency relief groups, etc.; and, 3) 1718.8-1722.2 MHz, for radio astronomy. AFTRCC and Rockwell request that the aeronautical flight test voice communications frequencies, 2.8-22 MHz and 123.2-123.8 MHz, and the aeronautical flight test telemetry frequencies, 1435-1530 MHz, be restricted. NAB asks that the commercial broadcast radio and television bands, 530-1610 kHz, 54-72 MHz, 76-108 MHz, 174-216 MHz and 470-806 MHz, and part of the television broadcast auxiliary bands, 2450-2483.5 MHz, be restricted. EIA/LMRS asks that the land mobile bands be restricted. The Pacific Companies [23] ask that the common carrier microwave bands be restricted. The League and many individual amateur operators ask that the bands allocated to the Amateur Radio Service be restricted. A number of individual comments request that the bands allocated for International Broadcast (shortwave) stations be restricted. The FAA requests that most other frequency bands allocated for use by the U. S. Government, 0.19-0.435 MHz, 0.51-0.535 MHz, 118-137 MHz, 162-174 MHz, 225-400 MHz, 406-420 MHz, 1215-1400 MHz, 1710-1850 MHz, 2700-3000 MHz, 7125-8500 MHz, 14.5-15.35 GHz and 21.2-23.6 GHz, be restricted.

63. Several parties, particularly manufacturers of control and security alarm devices, object to the expansion of the restricted bands beyond those specified in the current regulations. For example, SEIA objects to the concept that governmental users have a right to determine what levels of emissions will be tolerated and in what frequency bands. SEIA further states that the Interdepartment Radio Advisory Committee (IRAC) under NTIA will not provide details about actual users' activities in these bands, making it impossible for SEIA or others to challenge the assumption that protection is needed. ITI states that because the *Notice* did not examine the actual usage in these bands, no rationale exists for the FCC to make a determination to restrict them. Transcience alleges that frequencies are made exclusive to the U. S. Government by a process not based on interference but merely on potential interference, no matter how unlikely the possibility that actual interference will occur. DORCMA contends that proponents of additional restricted bands generally offer no support for their request, other than to assert the importance of their operations in those bands. DORCMA states that, for example, NTIA does not supply any data or arguments with respect to the susceptibility or likelihood of interference to the 821-824 MHz and 866-869 MHz bands. Linear requests that all existing and proposed restricted bands be made available for use by Part 15 devices absent a factual supported showing that interference will be caused by such devices. Linear further objects to protecting passive uses of the spectrum, such as radio astronomy, and adds that spurious emissions from the authorized radio services, such as Part 90, are permitted at higher levels than that produced by Part 15 devices, rendering arguments in favor of retaining the proposed restricted bands arbitrary and capricious. [24]

64. Comments from some manufacturers of Part 15 devices request that operation of other Part 15 devices be prohibited in certain frequency bands. Micrilor and OCI ask that the 902-928 MHz band be restricted to spread spectrum operations to provide interference protection to their planned spread spectrum system. Sensormatic wants the 902-928 MHz and 2400-2500 MHz band restricted to permit only field disturbance sensors in order to provide interference protection to their Part 15 anti-shoplifting sensor tags. Sensormatic states that we should restrict other devices from these bands, including spread spectrum devices, in order to protect Part 15 operations that have become established under the current regulations. RADAR Inc. requests that the bands used by police radar detectors, 10.50-10.55 GHz and 24.05-24.25 GHz, be restricted.

65. NTIA and a number of others support the application of restricted bands below 70 MHz, stating that such restrictions are needed to prevent interference to the authorized services operating in those bands. A number of comments request an exemption from the proposed standard that only spurious emissions would be permitted in the restricted bands. Schlage requests a clarification that swept frequency field disturbance sensors would not be foreclosed from operating in certain restricted bands as their equipment currently operates in the proposed restricted bands between 2 and 30 MHz without interference. Checkpoint, which has a swept frequency field disturbance sensor operating around 8.2 MHz, makes a similar request. Dynatel indicates that there are a large number of passive electronic markers used by telephone companies that should be exempted from the restricted bands. These markers are used to indicate location points for underground cables that must eventually be relocated. It states that these markers, when interrogated by a transmitter, respond with a signal at 101.4 kHz. The interrogating transmitter produces a radiated signal level of about 5 uV/m at 75 meters which is less than that stated by USCG as needed to protect Loran C operation at 100 kHz.

66. We continue to believe that only those frequency bands allocated for services involving safety-of-life or for services that are required by the nature of their operation to use signals received at very low received levels should be designated as restricted bands. We, therefore, are designating as restricted from operation by Part 15 devices those bands proposed to be restricted in the *Notice* and some of the bands requested to be designated as restricted by the commenting parties. [25] The additional bands are:

(1) 90-110 kHz: Loran C radionavigation systems used for radionavigation by aircraft, ships, and, in the near future, land vehicles;

(2) 123.2-123.8 MHz: aeronautical flight test voice communications; [26]

(3) 162.0125-164.43 MHz, 164.72-166.73 MHz, and 167.72-173.2 MHz: wind shear detection around airports and to warn pilots when emergency action is needed, protection of national and visiting foreign dignitaries, and tracking of wildlife;

(4) 1435-1530 MHz and 2310-2390 MHz: aeronautical flight test telemetry; and,

(5) 1718.8-1722.2 MHz: radio astronomy.

We believe that it is not necessary to include the broadcast services, the amateur radio service and other operations raised by the commenters in the list of restricted bands. The emission limits being adopted in this proceeding should be adequate to protect these operations from interference. Further, since Part 15 devices must operate without protection from interference, we will not restrict bands used under Part 15 to operation by specific devices except where such a restriction is needed to reduce the potential for interference to the authorized services.

67. We conclude that the restricted bands below 70 MHz should be implemented to provide additional interference protection to the designated authorized radio services. Nevertheless, we will permit certain radio frequency operations within these bands at frequencies below 70 MHz. These operations are swept frequency field disturbance sensors, transmitters used by telephone companies to detect electronic markers, and cable locating equipment.

68. There are several swept frequency field disturbance sensor systems currently in operation on frequencies in the band 1.705-30 MHz. These systems have been operated without any known instances of interference to authorized radio services. We believe that these existing operations can be allowed to continue since they place signals in the restricted bands for only short periods of time. We note that the next highest restricted frequency band above 30 MHz is 37.5-38.25 MHz. Accordingly, we will permit the continued operation of swept frequency field disturbance sensors in the band 1.705-37 MHz; provided, 1) the frequency sweep must not stop with the fundamental emission located within a restricted band; and, 2) the fundamental emission must be located outside of the restricted bands more than 99 percent of the time that the device is actively transmitting.

69. We recognize that telephone companies presently operate transmitters at 101.4 kHz to locate electronic markers used to determine the location of buried cable. The 90 to 110 kHz band is used for Loran C operations and is being designated as a restricted band. Nevertheless, we are exempting these transmitters from the requirement that only spurious emissions are permitted in the restricted bands. These devices are used only intermittently by trained operators. Thus, the potential for interference being caused to Loran C operations is minimal. For similar reasons, we also are exempting cable locating equipment operated on frequencies below 490 kHz. Such equipment has never been found to be a source of interference.

70. *Limits for Spurious Emissions in the Restricted Bands.* The *Notice* proposed to limit spurious emissions in the restricted bands to the same levels as the general field strength limits. A number of comments suggest different spurious emission limits. NTIA requests that the proposed limits in the restricted bands below 960 MHz be reduced as follows:

Frequency Band (MHz)	Proposed Limit (uV/m at 3m)	NTIA Limit (uV/m at 3m)
30 - 88	100	15
88 - 216	150	27
216 - 960	200	67
Above 960	500	500

NTIA states that its proposed emission limits are based on calculations of the theoretical noise level of "typical" radio receivers. [27] It states that these more restrictive limits are necessary to provide adequate protection to receivers against the cumulative effects of multiple Part 15 devices. CORF requests that the limits for spurious emissions in the restricted bands be based on the threshold data contained in CCIR (International Radio Consultative Committee) Report 224-5. [28] CORF further requests that we require spurious emissions in the restricted bands to be attenuated at least 12 dB below the general limits or, as an alternative, that the limits on emissions in certain passive radio astronomy bands [29] be specified as 125 uV/m or 200 uV/m at 3 meters. CORF states that if the emission limits are reduced by 6 to 12 dB below the levels proposed in the *Notice*, it would not object to the use of average limits, as it uses average detection techniques for its receivers. CORF and others also request that these restricted bands and their associated emission limits apply to devices operated under Part 18 of our rules. [30]

71. Manufacturers of control and security alarm devices request that the limits for spurious emissions within the restricted frequency bands be increased. Chamberlain and others support the proposed spurious emission limits but argue that these limits should be based on average measurements. Genie requests that the limit above 216 MHz be increased to 1000 uV/m at 3 meters. Stanley wants the emission limit above 1000 MHz increased to 1000 uV/m at 3 meters, as measured by an average detector. DORCMA requests that average measurements be retained for emission limits in the restricted bands. DORCMA states that, by converting to CISPR quasi-peak measurements, the permitted emission limits are reduced by 4 to 13 dB below what would be allowed if average detectors were permitted. It further argues that if measurements were made with a peak detector, as proposed in the *Notice* for frequencies above 1000 MHz, the level of emissions would be reduced by 5 to 15 dB below the level of emissions that would be permitted if measurements were made by an average detector.

72. We note that NTIA's calculations represent the theoretical noise level generated within a receiver under ideal conditions. They do not take into consideration existing background noise levels and other noise sources which must be exceeded in order for a signal to be detected. NTIA's calculations appear to represent a worst case situation. NTIA also has not supplied any information detailing the cumulative effect referenced in their comments. Further, we do not believe that spurious emissions at the limits proposed in the *Notice* would cause interference problems to the authorized services. As stated by GM, there is no evidence that licensed communication services have been significantly impacted by the widespread proliferation of computing devices operating under the proposed limits. For these reasons, we are not adopting NTIA's proposal for tighter emission limits for the restricted bands.

73. The arguments presented by CORF are similar to those contained in their comments to Docket No. 86-422. CORF and the National Radio Astronomy Observatory jointly filed a Petition for Reconsideration of our *Report and Order* in Docket No. 86-422, requesting that the spurious emission limits in the restricted bands between 1000-5000 MHz that are allocated for radio astronomy be reduced from 500 uV/m to 125 uV/m. This matter was addressed by the Commission and resolved in an order adopted February 10, 1989. [31] In accordance with that order, we are retaining the emission limit of 500 uV/m at 3 meters, based on an average measurement, for spurious emissions from Part 15 devices that are located within the restricted bands above 1000 MHz. However, we wish to emphasize that we expect the actions being taken in this Order, making all Part 15 intentional radiators subject to the restricted bands and establishing emission limits above 1000 MHz, to reduce the level of emissions which appear in the radio astronomy bands from all Part 15 devices.

74. As stated above, we are retaining the emission limit established in Docket No. 86-422 for radio frequency signals appearing in the restricted frequency bands above 1000 MHz. Arguments from the manufacturers of control and security alarm devices for increases in the permissible level of emissions in this area of the spectrum were addressed in that earlier proceeding. Since no additional information was filed in conjunction with the *Notice* in this proceeding, we are not persuaded to increase that emission limit. In regard to the emission limits in the restricted bands below 1000 MHz, the levels proposed in the *Notice* are 16.5 to 30.5 dB higher than the 15 uV/m at 3 meters emission limit currently specified for control and security alarm devices. As noted by DORCMA, the change from average measurements to CISPR quasi-peak measurements results in a reduction in the permitted signal levels by 4 to 13 dB. Thus, the emission limits proposed in the *Notice* are effectively 3.5 to 26.5 dB higher than those specified under the current regulations. Therefore, we do not expect compliance with the spurious emission limits for the restricted bands below 1000 MHz to present design problems for the manufacturers of control and security alarm devices. We believe that the limits proposed in the *Notice* are sufficient to minimize the probability that interference would be caused to authorized radio services in the restricted bands. For that reason, we are denying the requests from the manufacturers of control and security alarm devices to change these limits.

5. Radiated Emission Limits for Unintentional Radiators

75. *Emission Limits*. In the *Notice*, we proposed to apply the same general emission limits we proposed for intentional radiators to unintentional radiators. Comments were requested as to whether it would be desirable to permit higher emission limits on the local oscillator frequency of a superheterodyne receiver. We stated that we believed these limits to be well within the capability of the current state-of-the-art in radio frequency design technology and that the limits appear to be sufficient to protect the authorized services from harmful interference. [32] Further, we recognized that the suppression of radio frequency emissions usually entails some costs in the design and manufacture of such devices. Because the proposed general limits would result in a significant reduction in the permitted level of radiated emissions from receivers, we proposed a liberal transition provision of ten years to allow receiver manufacturers sufficient time to develop equipment that complies with the new emission standards.

76. A number of comments object to the proposed limits. For example, PCA states that the limits are too strict and proposes that receivers be subject to the limits applied to Class A (non-residential) digital devices. EIA/CEG wants the proposed limits relaxed with no limit applied above 960 MHz. Thomson CE believes that higher limits on local oscillator frequency components should be permitted for superheterodyne receivers as these are not a known source of interference. It adds that the proposed limits are too strict for TV and radio receivers. Spectrum Measurement Corp. requests that the limits applied to the 40.68 MHz and 915 MHz ISM bands be deleted since ISM devices are permitted to radiate at any signal level. [33]

77. A number of comments object to our establishing emission limits and test requirements above 1000 MHz. For example, CBEMA states that there is no basis for a limit above 1000 MHz. CBEMA submits that there have been no indications of objectionable interference from unintentional radiators at the higher frequencies and the imposition of limits above 1000 MHz is arbitrary and capricious. AT&T states that frequencies above 1000 MHz have limited transmission range, and there is little, if any, evidence that interference has occurred in this range. AT&T adds that we have not defined test methods above 1000 MHz and the current information on test site calibration only goes to 1000 MHz. IDCMA states that manufacturers have made substantial investments in test equipment that is capable of testing only below 1000 MHz. IDCMA adds that the Commission must compile better information concerning the costs, availability and accuracy of test equipment that can measure above 1000 MHz and the likelihood of harmful interference occurring above 1000 MHz before implementing these regulations. IBM states that an increase in the range of measurements could add 10-15 percent to the time required for testing, adding that we should rely on the non-interference requirement for Part 15 devices rather than requiring a demonstration of compliance with emission limits above 1000 MHz. Further, a number of commenting parties indicate that the range of measurement table for unintentional radiators requires clarification.

78. PBS states that the proposed limits for unintentional radiators appear reasonable and prudent. PBS opposes any relaxation of the TV receiver local oscillator radiation limits, adding that the near universal use of solid state devices and other improvements in TV receiver tuners have eased the burden of meeting emission specifications and dramatically lowered the cost of doing so. PBS states that the costs imposed by both the existing and proposed limits for TV broadcast receivers are negligible. Chamberlain, supported by many of the comments from amateur operators, also opposes higher limits for TV receivers, stating that these receivers are the single largest source of potential interference to licensed services. Genie states that the Commission should prescribe the same emission limits for all unintentional radiators since they are all capable of causing interference to the authorized services operating in the restricted bands. [34] NTIA urges the Commission to reduce the permitted emission limits below the levels proposed to be allowed for intentional radiators. NTIA states that present day radio and TV receivers are sources of interference. NTIA further states that the spectrum above 1000 MHz contains restricted bands and many

critical systems which need protection from interference from Part 15 devices. NTIA submits that the frequencies at which interference could be encountered are increased by the higher clock speeds employed in digital devices and other equipment incorporating digital devices. USCG and others request that an emission limit of 5 uV/m at 300 meters be applied within the frequency band of 90-110 kHz for unintentional radiators in order to protect Loran C operations at 100 kHz. [35] NAB, NCTA and a number of individual comments want the emission limits to be tighter than what was proposed. [36] Finally, Martin Prehm and other individuals request that the Commission implement limits that would provide interference protection at a distance of about 10 feet.

79. As indicated in a number of the comments and based on our own experience, unintentional radiators can certainly be sources of interference. We believe that the limits proposed in the *Notice* are sufficient to reduce the possibility of such interference. These are the same limits that have been applied satisfactorily to residential computer products. We also believe that the limit on the level of radio frequency energy conducted onto the AC powerline is sufficient to protect Loran C operations and, therefore, that additional limits on radiated emissions within the band 90-110 kHz are not needed. Further, no evidence was submitted to justify higher limits for the emissions from the local oscillator in superheterodyne receivers. Such a relaxation in the limit on the local oscillator emission of a superheterodyne receiver could lead to increased interference to the authorized services.

80. The spectrum above 1000 MHz contains many critical radio services. There is a distinct need to provide interference protection to those radio services. Technological advancements have permitted the manufacture of inexpensive Part 15 consumer devices, particularly those incorporating digital circuitry, which have the capability of emitting high levels of unwanted RF signals above 1000 MHz. Further, we are adopting a number of general application "consumer" bands for use by intentional radiators at higher frequencies. These intentional radiators will have potentially large numbers of associated receivers producing emissions above 1000 MHz. Discussion concerning suitable test equipment, the calibration of measurement sites, and the sensitivity and proliferation of equipment in the authorized services is contained in paragraph 98 of this Order and is applicable to the need for measuring emissions from unintentional radiators at higher frequency ranges. No evidence was submitted to justify tighter limits from unintentional radiators. Interference protection at the distances requested by Martin Prehm and others could require the emission limits to be reduced by as much as 20 dB. We believe that not only are such tighter standards economically infeasible but that standards should not be imposed to protect an operator of a radio frequency device from self-inflicted interference. We believe that the limits being adopted in this Order can be economically met by the manufacturers of unintentional radiators. [37] Accordingly, we are adopting the emission limits proposed in the *Notice*, as modified by the use of average emission limits above 1000 MHz with a corresponding limit on peak emissions 20 dB higher than the maximum permitted average limit.

81. We are revising the frequency ranges over which radiated emissions must be measured from what was proposed in the *Notice*. First, in response to the comments we are clarifying the table specifying the range of measurements. Second, since the local oscillator emissions from superheterodyne receivers generally attenuate rapidly at higher level harmonics, superheterodyne receivers that do not employ digital devices need not be measured beyond the second harmonic of the highest local oscillator frequency. Third, because of the degree of spectrum congestion below 1000 MHz and the wide range of spectrum over which digital devices generate radio frequency emissions, we are retaining the current range of measurements for unintentional radiators operating between 1.705 and 108 MHz, i.e., up to 1000 MHz. Fourth, we are eliminating radiated emission tests for most unintentional radiators in which the highest frequency generated or used is less than 1.705 MHz. Such devices need only to be measured for emissions conducted onto the AC power lines. [38]

82. The changes to the emission limits being adopted in this Order are expected to result in an eventual reduction in background radio spectrum noise levels and a decrease in interference to the authorized radio services. To ensure that the application of these limits, including the increases in the required range of measurement, does not present major difficulties to the manufacturers of receivers, we are adopting the proposed ten year transition period. This ten year period is appropriate because of the extensive changes being made to the emission limits applied to receivers. Since the changes in the standards being adopted for unintentional radiators other than receivers are not significant, transition provisions of three years for authorization and five years for manufacture and importation, as applied to intentional radiators, are being implemented for those devices. A detailed discussion of these transition provisions is provided below in this *Report and Order*.

83. *Antenna Conducted Limits for Receivers*. In the *Notice*, we proposed to limit the amount of radio frequency energy conducted from a receiver's antenna terminals to no greater than 2 nW. This proposal is consistent with CCIR Recommendation 478-3 [39] and would limit interference to the authorized services resulting from signals being conducted from the receiver to the antenna. Under the current regulations, receivers are tested for radiated emissions with an antenna attached. The proposed change would permit the radiated emission test on a receiver to be conducted with the antenna terminals connected to a shielded termination, instead of having to employ an antenna, simplifying the test procedure.

84. In its comments, EIA/CEG objects to this proposal and states that emissions from receivers are primarily from the chassis. Gillespie, Prudhon & Associates, Inc. and Wilkens Engineering request that receivers that tune to the ISM bands be exempted from this requirement because the anticipated level of emissions from authorized ISM equipment can be expected to exceed normal receiver radiation levels. Thomson CE requests that this provision be made optional, permitting receivers to be measured with an antenna connected or with the antenna terminals terminated. Thomson CE adds that the proposed limit could be troublesome for UHF TV tuners having to meet critical noise figure requirements and could compromise other desirable performance characteristics by eliminating potentially important performance design trade-offs and could add significantly to the cost of the tuner assembly.

85. We do not agree with the comments of EIA/CEG that emissions from receivers are primarily from the chassis. The point from which these emissions occur depends on the design of the receiver. If, as stated by EIA/CEG, the emissions are primarily from the chassis, compliance with the antenna conducted limits would have no impact on the manufacturers of receivers. We also disagree with the comment of Gillespie, Prudhon & Associates, Inc. and Wilkens Engineering. While there are a large number of authorized operations conducted within the frequency bands allocated primarily for ISM devices, these authorized operations are not subject to the non-interference requirement applicable to Part 15 devices. [40] Part 15 devices must operate on the condition that interference not be caused to the authorized services. Thus, there is a need to reduce the emissions from Part 15 devices to a level sufficient to lower the probability that interference will be received by the authorized services. However, we do agree with Thomson CE that the test for antenna conducted emissions should be made optional and are so amending the regulations. Thus, the responsible party has the following options: 1) measure the radiated emissions from the receiver with an antenna connected to the antenna terminals of the receiver and without the need to measure the level of the antenna power conducted emissions; or, 2) measure the radiated emissions from the receiver with the antenna terminals terminated and shielded and measure the level of the power at the antenna terminals. In either case, the level of the radiated emissions from the receiver would be attenuated sufficiently to reduce the probability that interference to the authorized services would result.

86. *Frequency Range of Receivers.* In the *Notice*, the Commission proposed to apply the general emission standards to CB receivers and to all receivers that operate in the frequency range 30-1000 MHz. Under the current rules, only CB receivers and receivers that operate in the frequency bands 30-901 MHz and 935-940 MHz are subject to emission standards. In addition, the *Notice* invited comments regarding the need to further expand the frequency range over which receivers would be subject to the standards. Only two comments address this proposal. Rockwell objects to expanding the frequency range for receivers above 960 MHz generally as this also would include receivers employed for aircraft distance measuring equipment and air traffic control transponders from which there have been no known interference problems. CORF recommends that receivers that tune up to 1427 MHz be subject to the general emission limits to protect radio astronomy operations. We agree with Rockwell that receivers associated with aircraft distance measuring equipment and air traffic control transponders have not been found to be sources of interference. Further, the need to regulate receivers operating within the frequency band 960-1427 MHz has not been sufficiently justified by CORF. Thus, we are amending the regulations to apply the emission standards to CB receivers and receivers that operate in the frequency range of 30-960 MHz.

87. *Power Line Carrier Systems (PLC's).* PLC's are carrier current systems employed by electric power utility entities on their transmission lines, excluding those lines that connect the distribution substation to the customer or house wiring, for protective relaying, telemetry, and other general supervision of the power system. PLC's are permitted to operate within the frequency range of 10-490 kHz without a limit on the level of the radiated emissions. Power line carrier telephone and data systems are not permitted under these provisions, unless operated by the electric power utility under the stated conditions. Information regarding PLC's must be supplied to an industry-operated entity recognized by both the Commission and the NTIA, in accordance with Section 90.63(g) of our rules. As with other Part 15 devices, PLC's operate under the conditions that interference not be caused to other radio operations and any interference that is received must be accepted. No changes were proposed in the *Notice* affecting the rules on PLC's.

88. The USCG, FAA, NTIA and others request that power line carrier systems be subject to limits on the amount of radio frequency energy radiated within the band 75-125 kHz. They indicate that this is needed to provide additional interference protection to Loran C operations at 100 kHz. The USCG supplied a table showing the maximum level of radiated emissions which could be tolerated from PLC's within the frequency band 75-125 kHz without interference to Loran C operations. These comments also request that data concerning the operating characteristics of PLC's be made public to facilitate the location of interference sources to Loran C operations. As stated by the FAA, a non-interference basis condition can not be established unless the Loran C user has access to PLC technical and operational information including frequency, power, emission type, transmitter and receiver locations, duty cycle, duration of transmissions, etc. Objections to the changes sought by USCG and other comments were filed by UTC. UTC asserts that the public release of data regarding PLC operations, as required to be filed under Section 90.63(g) of our rules, would expose electric utilities to tremendous security risks. UTC adds that, because data on PLC operations reveals sensitive information vital to national security, release must be carefully controlled. UTC notes that a proposal to restrict PLC operation is premature as a method of disseminating information, to be established by an agreement between the Commission and NTIA, is under development.

89. While there were a number of substantive arguments in favor of limiting the emissions from PLC's within the frequency band of 75-125 kHz, we are not adopting limits at this time. Requiring compliance with the emission limits sought by USCG would mandate electric utilities to perform radiated emission measurements on all power lines used for PLC operation. This would be an extremely burdensome requirement for the electric utilities and would serve only to limit interference to Loran C reception by vehicles and aircraft that are located extremely close to power lines carrying PLC information. We would expect that, normally, those vehicles and aircraft would be near enough to the power lines to receive interference to Loran C reception for only short periods of time and could move a small distance from the power lines, if necessary, to alleviate the problem. Thus, it appears that the regulatory burden caused by imposing emission limits on PLC's would be excessive considering the possible limited benefits. Since PLC's must still operate under the condition that interference to the authorized radio services is not permitted, we are not adopting the limits to PLC operation proposed by the USCG and others. Further, we agree with UTC that it would be premature to order the immediate public release of PLC information prior to the finalization of the agreement between the Commission and NTIA. The nec-

essary information will become available in a manner worked out in that agreement. The agreement is not being constrained by this rule making proceeding.

C. Measurement Techniques

90. The *Notice* proposed a number of measurement techniques which would apply to Part 15 devices. These measurement techniques are discussed in the following paragraphs. While several comments object to the Commission establishing new standards without interested parties being able to simultaneously review the updated measurement procedures, the *Notice* addressed the measurement standards that could affect substantially the level of the emission being measured. Further, it was indicated in the *Notice* that updated measurement procedures for all intentional and unintentional radiators would be proposed soon for public comment. Thus, interested parties will have the opportunity to comment on any changes to the measurement procedures that may apply to their equipment.

91. *Detector Functions of Measuring Instruments*. The current Part 15 regulations express most field strength limits, and some conducted limits, in terms of the average value of the emission. In the *Notice*, we proposed the use of measurement instrumentation with a CISPR quasi-peak detector for radiated and conducted measurements below 1000 MHz. We indicated that the use of such a detector would provide a better indication of the interference potential of an emission. Further, the general emission limits were established based on CISPR quasi-peak measurements. We also proposed that emissions above 1000 MHz would be measured using a peak detector. [41] However, we recognized that control and security alarm devices and other periodic operations conducted under the current rules, would be significantly impacted by a change to quasi-peak measurements due to the extensive use of pulsed emissions by those devices. Therefore, the *Notice* proposed to retain average limits for such devices, except for emissions within the restricted bands. The *Notice* also proposed to place an associated limit on peak emissions for periodic transmitters, equal to 20 dB above the maximum permitted average limits.

92. A number of objections were raised against the required use of CISPR quasi-peak and peak measurements, mostly by the manufacturers of control and security alarm devices. Many of the comments state that the quasi-peak detector function was designed to measure the degradation of broadcast signals and that it was not necessarily intended for signals at the frequencies used by Part 15 devices. DORCMA and individual control and security alarm device manufacturers contend that average measurements provide a better indication of the interference potential of a device. DORCMA adds that the change to peak measurements above 1000 MHz would result in a reduction in permitted signal levels of 5 to 15 dB and that such a reduction is unreasonable, unnecessary and would cause unjustifiable economic hardship. SEIA and others argue that if average measurements are acceptable to reduce the potential for interference by the fundamental and spurious emissions of control and security alarm devices to services on non-restricted bands, they should also be acceptable to prevent interference to the authorized services in the restricted bands. Further, SEIA alleges that narrow band receivers tend to be immune to peak emissions. SEIA requests that the emission limits above 1000 MHz be increased by 20 dB if peak detectors are required. SEIA also states that eliminating average measurements in the restricted bands would require manufacturers to reduce output power to comply with the quasi-peak limits. Genie and Linear state that quasi-peak detectors will not provide uniform and neutral results, are inherently equipment sensitive, and are capable of yielding inaccurate measurements. CBEMA requests that average measurements be applied to digital devices for broadband emissions. NEMA requests that average measurements continue to be used for measurements of the emissions of field disturbance sensors. NEMA and GE state that quasi-peak measurements are appropriate for the European regulatory approach that permits the operation of equipment that complies with the limits even if interference is caused. They argue that such measurements are not appropriate for the U. S. where operation must cease if interference is caused. Thus, they contend that the limits for Part 15 devices do not need to be as strict.

93. In contrast, a number of comments support the change from measurement instrumentation using an average detector to instrumentation using a CISPR quasi-peak or peak detector. CDC states that the quasi-peak detector was designed to correlate best with the perceptibility of noise, i.e., interference, and, unlike average detectors, prevents systems from using shorter duty cycles to obtain higher emission levels which are not indicated with average measurements. NTIA states that average measurements were appropriate when amplitude and frequency modulation with constant carriers were the only types of nonlicensed devices in use. NTIA in support of the use of CISPR quasi-peak and peak measurements, adds that current equipment uses suppressed carrier, pulsed and spread spectrum modulation. Hence, more sophisticated measurement techniques are required. Digital, while also requesting higher limits on conducted emissions, wants the standards to be stated in terms of average and quasi-peak and to require measurements for both.

94. We continue to believe that the use of measurement instrumentation employing a CISPR [42] quasi-peak detector is appropriate for measuring emissions from Part 15 devices below 1000 MHz. As indicated by CDC and NTIA, the parameters of the CISPR quasi-peak detector were designed to consider the interference potential of radio frequency emissions to the authorized radio services, including those services allocated on the frequency bands employed by control and security alarm devices. The quasi-peak detector provides a better indication of the energy being radiated by the Part 15 device that could be detected as interference by a receiver in the authorized radio services than would be provided by average or peak detectors. [43] As an alternative to CISPR quasi-peak measurements, we will permit the measurement of emissions with instrumentation employing a peak detector with a measurement bandwidth equivalent to that of a CISPR quasi-peak detector. This is appropriate since peak measurements will result in levels equal to or greater than those obtained by the quasi-peak detector. However, we remain concerned that implementing CISPR quasi-peak measurements below 1000 MHz for all Part 15 devices would result in a need for many manufacturers to discontinue the production of a several existing devices which have not been demonstrated to be sources of interference. For that reason, we are retaining the use of measurement instrumentation employing an average detector, as was applied to periodic transmitters, for all operations currently permitted under Part 15 except for

operation in the band 0.51-1.705 MHz and non-periodic operation in the band 40.66-40.70 MHz, e.g., perimeter protection systems. [44] The application of measurements with a CISPR quasi-peak detector is being employed within these bands to provide additional interference protection to AM broadcast stations and because the band 40.66-40.70 MHz is being expanded to permit general types of Part 15 operation. The impact to perimeter protection systems, the only non-periodic system presently being operated in the band 40.66-40.70 MHz, from the change in measurement technique is minimized by the increased field strength limit that is being adopted. However, we also recognize that allowing the continued application of average measurements could permit high level peak emissions that could interfere with the authorized radio services. For this reason, we are adopting a corresponding limit on peak emissions of 20 dB above the maximum permitted limit on average emissions which will be applied wherever average emission limits are specified in the rules. This is the same peak limit that we proposed and are adopting for control and security alarm devices and other periodic transmitters. We also recognize that pulse modulated systems subject to measurement with a CISPR quasi-peak detector can generate excessive peak emissions if the pulse-repetition frequency is extremely low. For that reason, we are requiring pulse modulated systems for which a CISPR quasi-peak measurement is specified to demonstrate compliance with the standards based on the peak level of their emissions if their pulse-repetition frequency (PRF) is 20 Hz or less. There do not appear to be any existing devices with a PRF of 20 Hz or less that would be impacted by this change to the measurement requirements.

95. Our proposal to use measurement instrumentation employing peak detectors for frequencies above 1000 MHz was based on the general availability of peak-reading measurement equipment and the lack of CISPR agreement of specifications for a quasi-peak detector at those frequencies. However, we agree with the comments that the proposed limits above 1000 MHz, especially the general radiated emission limit, are too restrictive when measured with a peak detector. Instead, we believe that the emission limit recently adopted in the previously cited *Report and Order* in Docket No. 86-422 is appropriate for the general limit and measurement instrumentation employing an average detector should continue to be employed. In order to prevent possible interference from high level peak emissions and to provide additional interference protection to operations in the restricted bands above 1000 MHz, we are adopting a corresponding limit on peak emissions of 20 dB above the maximum permitted average limits, the same as we are applying where average measurements are used below 1000 MHz. While this is a compromise made necessary by the lack of quasi-peak measurement procedures for frequencies above 1000 MHz, we believe that it offers sufficient interference protection to the authorized radio services. Further, this standard addresses most of the objections from the manufacturers of control and security alarm devices, field disturbance sensors, and other equipment for which measurements above 1000 MHz are required.

96. *Frequency Range of Radiated Measurements for Intentional Radiators*. In the *Notice*, we generally proposed measuring emissions from intentional radiators to at least the tenth harmonic of the highest fundamental frequency of the device. Measurements would be limited by the state of the art in measurement techniques. The present rules do not require emissions from most intentional radiators to be measured above 1000 MHz. DORCMA and other manufacturers of control and security alarm devices object to this proposal due to the increased cost of testing and test equipment. They state that no rationale was provided for this change and there is no need for measuring emissions at higher frequencies. Genie requests 2000 MHz to be the upper limit for measuring emissions. Linear states that the FCC does not have procedures for the calibration of measurement test sites above 1000 MHz. Pittway adds that at frequencies above 2000 MHz the level of emissions attenuates so significantly that there is virtually no likelihood of harmful interference and it is unlikely that signals at the higher order harmonics could be detected above the typical noise floor of available test equipment.

97. NTIA, in its comments, notes that the spectrum above 1000 MHz contains a number of restricted bands and many critical systems. NTIA adds that the risk of interference from intentional radiators is increased by the sophisticated modulation techniques employed in newer Part 15 devices as well as by advances in radio frequency technology that permit the use of higher carrier frequencies. NTIA concludes that these technologies make it likely that spurious emissions will be produced above 1000 MHz and that the proposal to test to the tenth harmonic is reasonable.

98. In addition to the view expressed by NTIA, we see several additional reasons for requiring a demonstration of compliance with the emission limits at higher frequency ranges. First, authorized radio services are increasingly using frequency bands above 1000 MHz. Second, the equipment used by the authorized radio services, including equipment used above 1000 MHz, similarly is growing more sensitive. The cost to manufacturers of Part 15 devices for new test equipment and for the additional time needed to perform such tests is not sufficient justification for limiting the frequency range of required measurements to a fixed frequency such as 2000 MHz. The necessary test equipment is readily available. We also note that most manufacturers of control and security alarm transmitters already are required to test to 2000 MHz. Generally, test equipment that can be used to measure to 2000 MHz also can be used to test up to the tenth harmonic of currently manufactured control and security alarm devices. Thus, we reject the argument that our proposal will impose high costs by requiring the purchase of additional test equipment. Further, while manufacturers of Part 15 devices have been required to test above 1000 MHz for some time, the lack of specific test site calibration procedures from the Commission for frequencies above 1000 MHz has not caused problems with these tests in the past. Thus, we do not consider the argument that there is no published test site calibration information for testing above 1000 MHz to be sufficient reason to adopt an alternate requirement for the range of frequencies to be measured. Finally, a demonstration of compliance with the regulations at frequencies to the tenth harmonic is required for most equipment operating under the other Commission rule parts, e.g., equipment which is authorized under our type acceptance procedure. This testing requirement does not appear to cause substantial burdens to the manufacturers of equipment used in the authorized services. For these reasons we are adopting the proposal to require testing of Part 15 intentional radiators

to at least the tenth harmonic of their highest fundamental frequency or to the highest frequency that can be practicably measured. [45] To further clarify this requirement, we are defining the highest frequency practicable in the present state of the art of measuring techniques as 40 GHz. We realize that these changes will increase the range over which compliance must be demonstrated for some intentional radiators and, therefore, are adopting liberal time periods for compliance in order to ensure that these changes do not present major difficulties to the manufacturers of intentional radiators. We will allow equipment to be authorized under the current standards for three years, and we will allow manufacture and importation under the current standards for five years.

99. *Measurement Distances for Digital Devices*. In the *Notice*, we proposed to retain the existing distances for measurement of digital devices, i.e., 3 meters for Class B devices and 30 meters for Class A devices. However, several comments requested changes to these measurement distances. Digital, in its comments, requests that measurements of both Class A and Class B devices be specified at a distance of 10 meters. IBM requests that we permit the testing of small Class A devices at 3 meters. Spectrum Measurement Corp. requests that a distance of 6 meters apply to both Class A and Class B digital devices. CBEMA and a number of other commenters request that the Class A limits be specified at 10 meters.

100. The Commission is not changing the 3 meter measurement distance specified for Class B devices. A general specification of greater than 3 meters for these devices does not appear to be feasible because the low signal levels permitted for Class B devices normally could not be accurately measured at a greater distance. However, for Class A devices, a measurement distance of 10 meters would permit easier detection of signal at the higher Class A levels. Thus, we are adopting the radiated emission limits for Class A digital devices at a distance of 10 meters and are adjusting the limits for these devices by an appropriate amount, i.e., three times the limit specified at 30 meters. If testing at alternative distances is necessary for either Class A or Class B devices due to measurement in the near field or other reasons, such tests can be performed under the provisions being adopted in Section 15.31(f) in Appendix B.

101. *Measurement Standards*. The *Notice* proposed to add a new section to the rules to specify a number of standards that would be applicable to the measurement of emission levels from various devices. This proposal addressed measurement procedures used by the Commission and standards relating to on-site testing, test distances, adjustments to the equipment under test, line-impedance stabilization networks, system configurations, and other general test requirements. A number of comments addressed these proposals. In general, many of the comments indicate that these standards should be contained in the Commission's separately published measurement procedures. They submit that this would avoid requiring a manufacturer to consult both the rules and the measurement procedures to determine how to test the equipment. Other comments argue that the measurement procedures employed by the Commission should be subject to notice and comment prior to their implementation and should have the status of regulations.

102. We continue to believe it is useful to include certain elements pertaining to measurement of electromagnetic emissions from Part 15 devices in the rules generally as proposed in the *Notice*. The measurement specifications included in the rules will also be indicated in the measurement procedures for testing equipment to avoid the need for parties testing equipment to refer to both the measurement procedures and the rules for a full specification of the test requirements. Further, we intend in the near future to initiate rule making on each of the measurement procedures.

103. The comments also address specific features of the proposed measurement standards. IBM states that if the equipment is sampled by the Commission for testing, the measurement procedures in effect at the time the equipment was verified or authorized by the Commission should be employed. AT&T, IDCMA, IBM and Spectrum Measurement Corp. state that we should not impose a requirement to consult with the Commission when measurement procedures other than those published by and employed by the Commission are used to test equipment. IBM states that if we require swept frequency equipment to be tested with the frequency sweep stopped, we should clarify that the sweep need be stopped only at those frequencies chosen for final reported measurements. Amador, AT&T and IBM state that we should not preclude the use of anechoic chambers or open field test sites that use electro-magnetically transparent overhead structures in favor of open field test sites. DORCMA, Genie and Linear state that our reference to a variation in supply voltage is relevant only to AC power line voltage. They submit that battery powered equipment should be tested at the voltage provided by a new battery since a new battery generally produces the highest emission levels and the "end of life" point for a battery does not provide a suitable test condition. AT&T, DORCMA, EIA/CEG and IBM state that we should specify that tests be conducted with the controls set to produce maximum emissions, provided that such settings are consistent with the use of device for its intended purpose and the equipment is operated in a typical manner, since setting the controls to maximize emissions may not represent a usable operating condition. [46] NECIS and Tandy add that the emissions should not have to be maximized from systems consisting of multiple devices as this is unduly burdensome. AT&T and Linear state that the length of the wire leads required to be attached to the equipment under test should be the length used with the equipment in a typical application or should be specified at a length of one meter or one-quarter wavelength. Sensormatic states that the requirement to test composite systems with all of the devices in the system functioning does not describe a measurement method with sufficient particularity, leaving unresolved how a multiple antenna system would be tested. EIA/CEG states that we should clarify that every possible combination of accessories, peripherals or central control units does not need testing and that the testing of one typical configuration is acceptable. CBEMA and NCR state that when testing mixed Class A/Class B digital devices and that test indicates compliance only with the Class A limits, we should not require the Class A device to be identified as the source of the higher level emissions. IBM states that we should place the reference to the 13 dB allowance for wideband conducted emissions in the separately published measurement procedure bulletin for digital devices. Finally, AT&T, EIA/CEG and others argue that if the equipment is sampled by the Commission for testing, it should test the equipment under the same con-

ditions, e.g., the same distance, antennas, test configurations and measurement procedures, employed by the party performing the test.

104. To further clarify these regulations and to respond to the comments regarding the specific standards proposed in the *Notice*, we are changing several provisions of the proposed measurement standards. First, we will indicate that when the Commission samples equipment to determine that a product continues to comply with the regulations, we will employ the measurement procedures that were in effect at the time that the equipment was authorized or verified. Second, we are not adopting the proposed requirement to consult with the Commission when measurement procedures other than those published by the Commission are used. Third, we are amending the proposed rules to state that for swept frequency equipment, the frequency sweep is stopped only at those frequencies chosen for the final reported measurements. Fourth, we have added language that test sites other than open field test sites may be employed if they are properly calibrated so that the measurement results correspond to what would be obtained from an open field site. Fifth, we are amending the proposed rules to state that battery operated equipment will be tested at the voltage of a new battery. Sixth, we are clarifying that only those controls readily accessible to or intended to be accessible to the consumer need to be adjusted to maximize the level of the emissions. While a number of comments objected to fully exercising the device under test, it must be recognized that the device may be fully exercised by the consumer. As the device is required to comply under such conditions, there is no basis for changing this language. However, the specific test configuration which is employed and the manipulation of that configuration to maximize emissions will be addressed in the individual measurement procedures. Seventh, we are amending the rules to state that lead lengths greater than one meter are not required for testing. Eighth, we are continuing to require that composite systems be tested with all of the devices functioning, as under the current regulations. In addition, we have added clarifying language that if more than one antenna or other radiating source is designed to emit at the same time, measurements shall be performed with all radiating sources that are to be employed emitting. Additional provisions, such as the number of test radials, will be included in the separate measurement procedures. The use of the measurement procedures is proper here as the comments indicated concern only with describing the measurement method with sufficient particularity. Ninth, we have clarified that only one test using peripherals or external accessories is required and that all possible equipment combinations do not need to be tested. We are also clarifying that when a manufacturer makes both accessories (peripherals) and a central control unit, this equipment must be tested in combination with each other unless it can be demonstrated that the central control unit or accessories normally would be marketed or used with equipment from a different entity. This resolves the present problem where the responsible party is unable to demonstrate the compliance of its equipment when combined with other equipment that it manufactures. Currently, manufacturers of such equipment often combine their product with another manufacturer's product to demonstrate compliance, even though that equipment might not normally be used in that combination. Tenth, we have amended the proposed rules to clarify the emission standards that apply when Class A and Class B digital devices are combined. Eleventh, we have deleted the reference to the 13 dB allowance provided for wideband conducted emissions from digital devices. This 13 dB allowance currently is contained in FCC/OET MP-4, the measurement procedures for computing devices. The 13 dB allowance for wideband conducted emissions will be addressed in another proceeding.

105. We are not adopting the request by AT&T and EIA/CEG to use the same test conditions employed by the responsible party when we audit equipment. While we are permitting the responsible party to use alternative measurement procedures, we do so under the condition that equivalent results must be obtained. In addition, we are amending the language to permit testing at either closer or greater distances, depending on the particular case, to eliminate problems of testing in the near field and testing at distances where the background noise level exceeds the signal strength to be measured. Specific extrapolation and interpolation values are provided for measurements at different distances.

106. In addition to the changes discussed above, we are amending the proposed rules to retain Sections 15.76(c), 15.77(c), 15.79(d) and 15.143(e) of the current regulations. These sections address the frequencies at which measurements are required for receivers and intentional radiators, depending on the number of bands in which they operate and the width of those bands. Further, we have deleted the requirement that "suitable adjustment" must be made to the measured results for emissions that are wider than the bandwidth of the measuring instrument. Such adjustments are not needed with the use of CISPR quasi-peak measurements as these measurements determine the permitted emission level per unit bandwidth anywhere within the entire range of frequencies emitted by the Part 15 device. Thus, this measurement procedure is effective in controlling interference potential without a corresponding need to integrate the measured field strength to a high level simply because the Part 15 device is broadbanded. It is also not needed with average/peak measurements as the bandwidth of such measurement instrumentation must be "suitably adjusted" in order to perform the emission measurements.

IV. AUTHORIZATIONS AND APPLICATIONS

A. Equipment Authorization Program

107. A number of amendments were proposed to the authorization procedures applicable to Part 15 devices. Most of these amendments involved placing the equipment authorization requirements contained in Part 15 into Part 2 of the rules. A few changes to the specific authorization procedures were also proposed. For example, the *Notice* proposed to relax the equipment authorization procedure applied to intentional radiators operating in the frequency band 88-108 MHz from type approval to certification and to change the procedure applied to superheterodyne receivers associated with control and security alarm devices from certification to notification. [47] These changes are consistent with the procedures applied to other similar Part 15 devices. In addition, the *Notice* proposed expanding the requirements for information with respect to measurement facilities, submission of photographs of notified Part 15 equipment, and a number of

other changes to the procedures and requirements for authorization of Part 15 devices. These changes are addressed in the following paragraphs.

108. *Description of Measurement Facilities.* In the *Notice*, we proposed to move the requirement to file descriptions of the measurement facilities used in testing equipment from Part 15 to Part 2 of the rules. We proposed to change the current language to clarify who must retain the description of the measurement facilities. For equipment subject to verification, this data would be retained by the party responsible for the equipment. If the equipment is subject to certification or notification, the description of the measurement facilities would be filed with the Commission. The *Notice* also proposed additional filing requirements with regard to measurement facilities, i.e., a chart showing ambient emissions from 30-1000 MHz if chart recorders are used; a plot of site attenuation data; a description of the types of measurements which would be performed at the test facility; and, a sample calculation showing how the readings taken from the instrumentation are converted to the levels specified in the regulations. A number of objections to our proposal were received from AT&T, CBEMA, Digital, Linear, NCR and others. These parties object to the requirement for photographs of test sites, a chart showing ambient emissions, the description of structures at distances beyond the measurement facilities and the calibration requirements for measurement instrumentation. Other objections include the lack of reference to calibration using vertical polarization, the use of FCC Bulletin OET 55, the submission of a statement as to whether the test facility will perform contract work, and the submission of a statement regarding the types of equipment to be tested at the facility.

109. Our proposal was intended primarily to place the equipment authorization requirements contained in Part 15 into Part 2 of the rules with some added clarification. Because of the concerns raised in the comments, we are, for the most part, retaining the existing provisions for measurement site descriptions. However, we are modifying these provisions to clarify that for equipment subject to verification, the site description may be retained either by the party responsible for the equipment or by the laboratory that performed the equipment testing. As under the current rules, a description of the measurement site must be submitted to the Commission for equipment subject to notification or certification. [48] In addition, we are adopting the proposal that a description of the type of equipment intended to be measured at the site be retained or submitted to the Commission, as appropriate. This latter change is useful in determining the type of instrumentation needed for testing at the site. These changes are not expected to impose substantial additional burdens on test laboratories or manufacturers.

110. *Notified Equipment.* The *Notice* proposed to amend the rules to require that photographs of the external appearance of Part 15 devices accompany the submission of an application for a grant of notification to the Commission. This requirement was proposed to allow the Commission to identify the specific Part 15 equipment for which a grant of notification is issued. The only objection to this proposal came from AT&T. They requested that line sketches be allowed instead of photographs. We believe the staff will be able to identify specific Part 15 equipment from photographs or line sketches. Therefore, we are requiring that applicants submit either photographs or line drawings of the external appearance of the equipment with their application for a grant of notification. The photographs or line sketches submitted must be sufficiently detailed to allow identification of the equipment.

111. *Application for Certification.* The *Notice* proposed to place all of the procedures for obtaining a grant of certification into Subpart J of Part 2. We also proposed the following changes to the present rules: to delete the requirement for schematic diagrams for unintentional radiators and to add a requirement for submission of a description of any changes to the equipment which were needed to allow it to comply with the regulations. We further proposed in connection with the description of changes made to non-compliant equipment to achieve compliance, that extensive retrofitting of a device could result in a denial of the application unless the applicant attests that it will make those changes to all equipment marketed under the grant of certification. The *Notice* proposed to retain the other existing regulations pertaining to certification.

112. A number of comments, e.g., CBEMA, Linear, Digital, AT&T, NCR, etc., object to these proposals, particularly the requirement to submit a description of changes made to the equipment to comply with the standards. These parties also object to retaining the requirements to submit a copy of the instruction manual, the description of the circuit functions of the device, information on oscillators employed in the device and photographs of the equipment. No objections were received to deleting the requirement for schematic diagrams for unintentional radiators.

113. We generally find that the proposed requirements are necessary to sufficiently describe the equipment for which certification is being sought. However, in response to the comments we are not adopting the proposed requirement for submission of a description of the changes made to non-compliant equipment in order to comply with the rules and the corresponding statement that these changes will be incorporated into the equipment prior to marketing. As provided in Sections 2.907 and 2.931 of the current regulations, certification attaches to all units marketed by the grantee which are identical to the sample tested except for permissive changes and other variations authorized by the Commission. Further, the grantee warrants that each unit marketed under the grant will conform to the unit that was measured and that the data filed with the Commission will continue to be representative of the equipment. Thus, no additional regulation regarding the changes made to certified equipment to comply with the standards is necessary. If changes to the equipment which are needed to comply with the standards are not incorporated, the grant of certification issued by the Commission is not valid. We also are adding a requirement to the rules that the application for certification shall contain a brief description of any peripheral or accessory devices connected to or installed in the equipment which was tested. Further, any such peripherals or accessories must be unmodified, commercially available devices. This change is consistent with the Public Notice issued by our Office of Engineering and Technology on August 17, 1988.

114. *Authorization of Multiple Devices in One Enclosure.* In the *Notice*, the Commission proposed to clarify Sections 2.975 and 2.1033 of the rules, which pertain to application for a grant of notification or certification, by adding a statement that a single FCC identifier may be

assigned to a unit of equipment consisting of multiple devices within a single enclosure (as composite system). These sections currently do not address such equipment. However, the use of a single FCC identifier with composite systems is consistent with the existing provisions of Section 2.925 of the rules, which provides standards for equipment identification, so long as a separate FCC Form 731 and associated fee is submitted for each individual device in the enclosure. Linear opposes this clarification, arguing that the Commission should require a separate FCC identifier on the enclosure for each individual device incorporated therein. It also states that the Commission should permit the individual devices in a composite system to be used separately and in other composite systems without changing their FCC identifiers or obtaining a new grant of authorization. The approach proposed by Linear does not address the fact that the level of emissions from an RF device typically are affected significantly by the enclosure in which it is contained. If we were to permit RF devices to be reconfigured in other enclosures under the same FCC identifier without re-examining whether the device complies with the technical standards, the effectiveness of our authorization program as a means to control interference would quickly be compromised. Accordingly, we are retaining our existing regulations in this area and adding the clarification of Sections 2.975 and 2.1033 proposed in the *Notice*.

115. *Changes to Certified Equipment.* The current regulations define permissive changes that may be made to certified devices. [49] Permissive changes encompass any electrical or mechanical changes to the construction of the device that result in the equipment continuing to comply with the appropriate standards. However, our regulations also reference changes other than permissive changes, which require the issuance of a new grant of authorization, without defining what constitutes a "non-permissive" change. This has generated considerable confusion within the industry. Thus, the *Notice* proposed to add new language as to what constitutes a major modification (non-permissive change), requiring the issuance of a new grant of certification. As proposed, a major modification would be a change to the frequency multiplication circuitry, the basic modulator circuitry or maximum power rating, replacement of an internal circuit board with one of a different type (excluding some changes that are permitted for digital devices), and changes in digital devices to the clock speed, number of board layers, layout or filtering. Thus, major modifications would consist of changes that result in new circuit configurations and other changes that could have a significant impact on the level of the emissions. The *Notice* also proposed to clarify that permissive changes can be performed only by the grantee.

116. The majority of the comments responding to this proposal request that the Commission permit grantees to make any changes to their equipment as long as the equipment still performs the same function. These parties request that they be permitted to market their equipment under its original FCC identifier number, even after modification, without the need to obtain a new grant of certification. CBEMA states that a new grant of authorization should be required only if the grantee wants to change the identification of its products. NEC states that the Commission's regulations are unable to keep pace with the rapidly changing technology in the computer field, and, thus, they oppose any requirement for reauthorization after major modifications. EIA/CEG states that it is unnecessarily burdensome to require reidentification and recertification for modifications that alter the design even where such changes do not degrade compliance with the limits. Tandy opposes the provisions on major modifications, arguing that these provisions would promote unintended and undesired public policy results by requiring reidentification of equipment for modifications which alter the engineering design characteristics of a device but do not degrade performance in terms of the emissions. Tandy argues that the provisions on major modifications discourage interference-related improvements to equipment. Some comments, including those from AT&T, request changes to the current Class II permissive change rules to permit any changes to be made to equipment without a requirement to report such changes as long as the emissions are attenuated more than 6 dB below the permitted limits. CBEMA states that the requirement to report equipment changes to the Commission represents a substantive burden that does not permit rapid response to marketplace pressures for new, upgraded products.

117. The proposals addressing major modifications to certified equipment were intended to clarify that a new grant of certification is required for changes that result in new circuit configurations and other changes that could have a significant impact on the level of the emissions. The Commission generally applies the certification procedure to equipment that it expects to have a higher likelihood of exceeding the emission limits. We generally have found that higher emission levels are typical of equipment that uses "new technology" or is highly complex. Thus, we continue to believe that in order to ensure that equipment subject to certification continues to comply with our rules, it is necessary to recertify such equipment whenever it is modified in a manner that affects its basic emission characteristics. The emission characteristics primarily are affected by changes in frequency, emission type, e.g., the modulation characteristics, and output levels. Thus, changes to the basic frequency determining and stabilizing circuitry (or clock rate), frequency multiplication stages, basic modulator circuit or maximum power ratings constitute changes that could significantly impact the emission characteristics. Such changes must be addressed as major modifications to the equipment, requiring the application for and issuance of a new grant of authorization. Other changes to the equipment generally can be treated under the existing Class I or Class II permissive change procedures. Changes made as permissive changes can still be reviewed by the Commission on an individual basis to determine if the changes should be addressed as major modifications.

118. We believe that the language being adopted in this *Report and Order* provides adequate clarification of the types of modifications to equipment that constitute a major change. This clarification will reduce the necessity of contacting the Commission for guidance whenever changes are made by manufacturers. The new provisions detailing major modifications are not an actual change to the equipment authorization requirements. Rather, this action places within the regulations policies that have been in effect since the start of the certification requirements, though they sometimes have been applied inconsistently due to the lack of specific regulations. Placing this policy within the regulations will remove the ambiguities resulting from its application on an ad hoc basis

through staff interpretation. We are rejecting the requests to allow any changes to be made to equipment without reidentification as long as the equipment continues to perform the same function. Such a change would allow a grantee to obtain one grant of certification for each type of product manufactured and then apply the FCC identifier number for that grant to all of its products that perform the same function, regardless of differences in design, emission levels, or interference potential. If this were allowed to occur, we would no longer be able to identify a particular product as an authorized device. Finally, since the grantee is responsible for compliance of the equipment with the Commission's standards, [50] the authority to make permissive changes must be limited to the grantee.

119. *Party Responsible for Compliance with the Regulations*. The *Notice* specified the general term "manufacturer" to indicate the party responsible for ensuring that a device complies with our regulations. This resulted in some confusion because the manufacturer may not hold the grant of authorization. In that case, the grantee and not the manufacturer is the party responsible for ensuring compliance. Linear, on October 16, 1987, filed a Motion for Consolidation, Request for Clarification and Motion for Extension of Time Within Which to File Comments, requesting, among other things, clarification of the use of the term "manufacturer" as the responsible party. [51] To provide the clarification sought by Linear, we are adding a new Section 2.909 to Part 2 of the regulations in order to designate exactly who is responsible for equipment complying with the appropriate technical standards after a grant of equipment authorization is issued by the Commission or the equipment is verified. That new rule section provides that, with respect to equipment that must be issued a grant of equipment authorization, the holder of that authorization, i.e., the grantee, is the responsible party. This is consistent with 47 CFR Sections 2.903-2.907 and 2.931. For verified equipment, the manufacturer or, in the case of imported equipment, the importer is responsible for the device in accordance with the provisions of existing Sections 2.951-2.957 of our rules. [52] In the case of imported equipment subject to verification, Section 2.953(a) indicates that the importer must warrant compliance. Further, Section 2.955(a) requires the importer of foreign made equipment to retain the verification records. Thus, our designation of the importer as the responsible party for foreign manufactured equipment is a clarification only and does not constitute a change in our regulations. Defining who is responsible for the compliance of radio frequency equipment with the technical standards allows us to discontinue the use of the general term "manufacturer" and substitute instead the term "responsible party".

120. *On - Site Measurements*. In the *Notice*, the Commission proposed to continue its existing policy of permitting on-site measurements of equipment such as perimeter protection systems, carrier current systems and systems employing a leaky coaxial cable as an antenna that are impractical to measure on a laboratory site. This proposal, inadvertently, did not include provisions to allow this equipment to be marketed for installation at the location where on-site testing would be performed. Similar provisions currently exist for devices such as perimeter protection systems. CDC mentions this omission in its reply comments. Senstar recommends that broadband sensors, but not narrowband sensors, be tested at every site even after certification is obtained. We are adopting rules for on-site testing as proposed. We also are changing Section 15.201 of the proposed rules to incorporate provisions to allow the marketing, prior to authorization, of those intentional radiators for which measurements must be made at the installation site. Because of the potential for interference to television reception, we are retaining the current requirement that perimeter protection systems operating on the TV broadcast frequencies must be tested at each installation site, regardless of whether these systems are broadband or narrowband.

121. *Labelling Requirements*. In the *Notice*, we proposed to require all radio frequency devices operating under the provisions of Part 15 to be labelled. This label would indicate that the equipment complies with the regulations and that its operation is subject to the conditions that interference not be caused and that any interference received by the Part 15 device must be accepted. The latter statement would not be required to be included on labels used on receivers associated with the operation of a licensed radio service. Further, we proposed to allow the label information to be placed on the first page of the instruction manual supplied to the user or, alternatively, on the container in which the device is marketed if the Part 15 device is so small or is for such use that it is not practicable to place a label on the device.

122. A number of comments request changes to the proposed labelling requirements. The League and a number of individual commenters want the statement that Part 15 devices must accept interference to be expanded to include a statement referring the user to the manufacturer in the case of received interference. These comments request that the instruction or user manual contain the name and telephone number of a manufacturer's representative that can be contacted should interference occur. NCR and Genie, on the other hand, state that the label should read only that the device complies with Part 15. As stated by Genie, it is up to manufacturers to consider potential interference when developing their product, and a more detailed statement concerning operating conditions can be placed in the instruction manual. CBEMA, Digital and IDCMA state that the label should not reference susceptibility to interference since the Commission does not regulate that facet of the device's performance. Thus, they request that we delete all reference to computers having to accept interference, leaving this matter of product performance to the marketplace. TI states that information on eliminating interference should be in the instruction manual rather than on the equipment, and that the label currently required for computing devices, referencing the instruction manual, is more appropriate. ANARC states that a label regarding the vulnerability to interception of the signals by other parties should be required, such as the label presently required for cordless telephones. NEMA and GE request that the label for Part 15 devices operating in the ISM bands be expanded to state that the band is allocated primarily for non-communication uses of RF energy. Finally, IBM and a number of other parties state that in cases where the label is not included on a device because of size or other limitations, we should permit its inclusion anywhere in the instruction manual, instead of just on the first page, as long as it is prominent. IBM states that prudence dictates that safety and warranty information appear early in the user materials.

123. We believe that the addition to the label of a statement referring the user to a manufacturer's contact in case of interference, as requested by the League and others, would be impracticable. We believe that it would be unreasonable to burden manufacturers with the responsibility for addressing individual interference problems experienced by devices that expressly are not protected from interference. Such a requirement would be costly for manufacturers and the information on a device would become inaccurate over time as personnel, orginizational structures, and telephone numbers of a manufacturer changed. Thus, this request by the League and others is not being adopted. The Commission also is not persuaded to adopt the suggestions of NCR, Genie, CBEMA, Digital and IDCMA for modifying the label. One of the primary operating conditions under Part 15 is that any interference that is received by a Part 15 device must be accepted. We believe that the placement on the label of the simple fact of this condition of operation is sufficient to alert users to the possibility that the device might be subject to interference. With respect to the comments from TI, information regarding the elimination of interference caused by a digital device is required to be provided to the consumer in the text of the instruction manual under both the current and the proposed rules. As long as this information is included in the instruction manual, there does not appear to be a compelling reason to require an additional reference to it on the label, although manufacturers are free to do so. We do not find it necessary to require information on the label to advise users of the vulnerability of signals of Part 15 devices to interception by other parties. There is no indication that users are not aware of this potential or that such interception is occurring in a manner that warrants regulatory action. With respect to the comments from NEMA and GE, because of the large numbers of non-ISM devices authorized to operate within the frequency bands allocated for ISM, we believe that requiring the requested statement could cause confusion by appearing to offer some degree of protection from interference caused by non-ISM sources. No such implication should be made since Part 15 devices must accept interference from any other source of RF energy. Finally, we agree with the comments from IBM and others that, in those cases where the label is not provided on the equipment, it is not necessary to require that the label be presented on the first page of the instruction manual. The new rules will allow the label to be included in a prominent location anywhere in the instruction manual supplied to the user.

124. *Special Accessories*. In the *Notice*, we proposed to require that any special accessories that are needed to enable a device to comply with the rules be supplied with the device. Special accessories are defined as accessory items that cannot be obtained readily from multiple retail sources. The comments from the manufacturers of computing devices generally oppose this proposal. EIA/CEG objects to requiring digital devices to be supplied with special accessories, such as shielded cables, since the manufacturer does not necessarily know to what other devices the equipment will be connected and, without this information, cannot match connectors. IDCMA indicates that manufacturers cannot predetermine what cable lengths or connectors may be required by the consumer. IDCMA suggests that the only requirement should be for the manufacturer to have the accessory available for sale and its use noted in any literature supplied with the device.

125. In its proposal, the Commission's intent was to ensure that Part 15 devices comply with the regulations in the configurations in which they will be used by the consumer. The proposal recognized that if a $ 50.00 connecting cable is required to make the system compliant and if a $ 5.00 cable is available to the consumer and will allow his system to function without regard to compliance, the consumer normally will purchase the cheaper cable, regardless of the interference potential. Further, the consumer generally has no means to determine that the installed digital device system, as configured, complies with our standards. For these reasons, we believe it is necessary to require that any special accessories needed for a device to comply with the rules must be supplied with the device when it is marketed. We have modified, however, the proposed rule to recognize certain situations where it is appropriate to provide flexibility. First, the requirements for supplying special accessories will not apply to equipment that must be professionally installed or is installed by or under the supervision of the party marketing the equipment. Second, any cable or other special accessory that can be readily obtained from multiple retail outlets need not be supplied with the device. The instruction manual, however, must specify the accessories, if any, needed for compliance. Third, in lieu of shipping or packaging the special accessories with the intentional or unintentional radiator, the party responsible for the equipment complying with the rules may employ other methods of ensuring that the special accessories are provided to the consumer, without additional charge, at the time of purchase. Information detailing any alternative method used to supply the special accessories shall be included in the application for a grant of equipment authorization or retained in the verification records, as appropriate.

B. Marketing of Digital Devices

126. Section 2.806 of the existing rules provides limited exemptions to the marketing provisions for digital devices. We proposed to clarify that the exemptions to the marketing provisions shown in paragraphs (a) and (c)(2) of that section apply only to digital devices subject to verification. CBEMA, IBM, AT&T, Digital, Aox and other computer manufacturers object to our intended clarification of these exemptions to the marketing regulations, believing that the current exemptions also apply to digital devices subject to certification. IBM requests that we further amend this section to: 1) allow digital devices which have not been authorized to be operated at the facilities of entities working under the authorization of the manufacturer; 2) permit the pre-authorization delivery of equipment to distributors and retailers; 3) permit demonstrations in commercial establishments of personal computers which have not been certified but have been verified to the Class A limits; and, 4) permit the taking of orders for non-authorized personal computers, subject to a disclaimer reading "Pending FCC Approval".

127. Paragraph (a) of Section 2.806 provides an exemption to Section 2.805 of our marketing rules. Section 2.805 provides that a radio frequency device that does not require Commission approval (the implication of this is that the device is subject to verification) must comply with the specified technical standards prior to being marketed. It does not apply to equipment which is subject to a grant of authorization from the Commission, e.g., certification. Thus, our proposed clarification that the

marketing exemptions do not apply to digital devices subject to certification is consistent with the existing construction of the rules, and we will amend Section 2.806 to avoid further misunderstandings. We also are amending Section 2.805 to specifically state that this section applies to the marketing of equipment subject to verification. We are continuing to limit the marketing exceptions in Sections 2.806(a) and (c)(2) to apply only to verified equipment subject to Section 2.805, as clarified, to prevent possible interference to the authorized services that could result from the marketing of Class B personal computers and peripherals that have not been authorized and may not comply with the standards. We concur with the comments from IBM that the facilities of the manufacturer should include the facilities of those entities working under the authorization of the party responsible for the development and manufacture of the equipment. Thus, the new rules will permit digital devices that have not been authorized to be operated at the facilities of other parties associated with the manufacturer/developer of the equipment. However, we do not agree that the marketing regulations should be amended to permit the taking of orders, including orders from distributors or retailers, or pre-authorized delivery of equipment. Such actions could result in the marketing to the public of non-complying equipment.

V. MISCELLANEOUS ISSUES

128. *Campus Radio Systems.* The *Notice* proposed permitting Part 15 AM radio broadcast systems operating in the band 535-1705 kHz to be installed on the campuses of educational institutions. The general emission limits would apply at the boundary of the campus. IBS and LPB comment that this restriction would pose difficulties for city-bound institutions since they have no actual campus. They also argue that no conducted limits should apply outside of the campus as it is highly impracticable to measure or to prevent such emissions. IBS and LPB request that the operating authority for these stations be expanded. In particular, they request that the frequency band be expanded to cover 525-1705 kHz to permit operation at 530 kHz and that operation be permitted on any frequency outside of the protected field strength contours of licensed AM stations. IBS and LPB state that there is no showing of a need to require verification of these systems. Finally, they argue that data to be kept on file should be retained at the studio/office location rather than the location of the transmitting equipment.

129. We recognize the requirement that campus radio stations meet the general emissions at the boundary of the campus may pose certain problems for institutions located in cities. However, operators of campus radio stations will have the option of meeting the emissions standards at the boundary of the institution or of using transmitters that have been authorized for use in this band under the general standards provided (Sections 15.219 or 15.221). We believe the potential for interference to licensed AM stations is too great, particularly in urban areas, to allow campus stations to exceed the standards provided under these options. To simplify verifying compliance with the conducted emissions limits, we will permit measurement of conducted emissions of each individual transmitter used in the system, rather than the system as a whole. We find it desirable to expand the frequency range over which campus stations may operate to include 525 kHz for the reasons indicated by IBS and LPB. The new rules will permit operation of these stations in the band 525-1705 kHz. However, the new rules will specify that campus stations must not operate within the protected field strength contour of licensed AM stations operating on the same frequency. With regard to verification of campus systems, we maintain that it is necessary to perform the required measurements to ensure that the system complies with the emissions standards. Finally, we find it acceptable to permit the verification records to be kept at the station studio, office, control room or transmitter location, as may be preferred by the station operator, and are providing for this discretion in the new rules.

130. *Spread Spectrum Systems.* In the *Notice*, we proposed to retain the current provisions for direct sequence and frequency hopping spread spectrum operation within the frequency bands 902-928 MHz, 2400-2483.5 MHz and 5725-5850 MHz. We also proposed to clarify the requirements on the gain processing and bandwidth employed by receivers used with spread spectrum systems to ensure that an actual spread spectrum system, and not just a spread spectrum transmitter, is employed. Further, comments were requested on the feasibility of designating field strength limits instead of the current limit on transmitter output power.

131. While a number of comments addressed the questions raised in the *Notice* concerning the bandwidth of the receiver, the level of gain processing that should be employed in the receiver and the application of field strength limits, we are not resolving these issues in this Order. These issues and the use of spread spectrum modulation techniques other than direct sequence and frequency hopping will be addressed in the near future in another rule making proceeding.

132. *Specialized Field Disturbance Sensors (Vehicle Radar Systems).* The *Notice* observed that the Commission has issued a waiver to Vehicle Radar Safety Systems, Inc. (VRSS) to permit the operation of a collision avoidance system with a field strength limit 9.5 dB higher than permitted for field disturbance sensors under the current rules. [53] Comments were solicited as to whether higher field strength limits should be permitted for field disturbance sensors used in specialized operations requiring additional range, provided the need for additional range can be demonstrated and the likelihood of increased interference is negligible. While the comments addressing this issue generally support our proposal, we are not adopting a specific regulation concerning waivers of the emission limits for field disturbance sensors. We will continue, as in the past, to entertain waiver requests on a case-by-case basis. This will allow requests for waivers to be considered on their individual merits, including whether operation under one of the licensed radio services is feasible. Further, this review will permit coordination with NTIA when an operation is conducted on frequency bands allocated to the U. S. Government.

133. *Automatic Vehicle Identification Systems.* The *Notice* proposed to delete the provisions for automatic vehicle identification systems (AVIS) in the 2.9-4.1 GHz band. The deletion of AVIS was proposed due to the lack of use of these provisions and the inclusion of a number of restricted bands within the currently employed frequency range. Since issuance of the *Notice*, the Commission has been contacted informally by the Arizona Department of Transportation (AZDOT) regarding a multi-state AVIS system it has under development. As stated in the *Notice*,

we are concerned about possible interference to sensitive receivers employed by the U. S. Government for radiolocation systems in those portions of the 2.9-3.6 GHz band that are not listed as restricted bands. On the basis of these considerations, we will continue to permit AVIS systems in those portions of the 2.9-4.1 GHz band that have not been designated as restricted bands. However, we intend to revisit the need for retaining provisions for AVIS in a future rule making proceeding.

134. *Tunnel Radio Systems*. The *Notice* proposed to allow operation under Part 15 within tunnels or mines without the specification of emission limits except for radio frequency energy radiated outside of the tunnel or mine. While none of the comments object to the provisions for a tunnel radio system, Spectrum Measurement Corp. questions why it is necessary to exclude from the tunnel radio provisions an outside system used to receive signals rebroadcast within a tunnel. The reason for exempting RF devices employed within a tunnel or mine from the technical standards, including the individual equipment authorization requirements, was based on the premise that the natural earth and/or water boundaries of the tunnel or mine would tend to act like a screen room, attenuating the signals radiated from that tunnel or mine. Emissions from equipment located outside of the tunnel or mine would not be so attenuated. Thus, RF equipment located outside of the tunnel or mine must still demonstrate compliance with the necessary standards and must comply with the appropriate equipment authorization requirements.

135. *Antenna Connections for Intentional Radiators*. The *Notice* proposed to require Part 15 intentional radiators to be designed in such a manner that only the antenna furnished by the manufacturer could be employed. It stated that the use of a permanently attached antenna or an antenna which employs a unique coupler would satisfy this requirement. This was proposed because the antenna characteristics directly affect the field strength of the radio frequency emissions. A number of comments object to this proposal, citing that such a regulation would make it difficult for the user to replace a broken antenna. The Commission agrees with the comments and is revising the proposed language to permit a manufacturer to design the equipment so that a broken antenna can be replaced by the user. However, in order to ensure that only an antenna of the type originally furnished by the manufacturer is used and to preclude replacement of the original antenna with one that increases the radiated signals, we are prohibiting the use of a standard antenna jack or electrical connector, similar to the regulation presently applied to cordless telephones. In addition, we are exempting from this requirement devices that have standards expressed only in terms of transmitter output power levels instead of field strength limits, devices that must be measured for compliance with our emission standards at the installation site, and devices that must be professionally installed.

136. *Use of Multiple Intentional Radiators*. In the *Notice*, we proposed to prohibit the use of multiple radiators for the purpose of extending transmission range or for extending the area of coverage. Biomedical telemetry devices were proposed to be excluded from this requirement as long as such devices were restricted to a localized area such as a hospital or residence. The comments in this proceeding generally object to this proposal. For example, AT&T states that it sees no need to exclude multiple emitters because the field strength limits will prevent significant interference from any given radiator and the authorization of such operation might enable the provision of a cellular-type building paging system under Part 15. AT&T adds that multiple intentional radiators should be permitted in commercial environments when installed in accordance with the manufacturer's instructions, provided the field strength at a distance of 30 meters outside of the commercial property boundary does not exceed the limits in the proposed Section 15.109(c). Sensormatic objects to the proposal since they use multiple antennas with their field disturbance sensors used for anti-theft tag sensors for the coverage of exits. GM expresses similar concerns about applying this requirement to field disturbance sensors. PA Consulting Group indicates that Part 15 multiple digital spread spectrum repeaters are desirable to permit high throughput coverage of an area. Manufacturers of control and security alarm devices request the deletion of this provision to allow RF link relays for life-safety applications.

137. We are not adopting a prohibition on the use of multiple transmitters to extend transmission range or coverage area. [54] We concur with the comments that multiple devices should be permitted provided the individual transmitters comply with the rules. However, we are denying the request by AT&T to allow multiple intentional radiators in a commercial environment with field strength limits measured 30 meters beyond the property boundary. The higher field strengths used by such systems would pose unacceptable potential for interference to authorized services.

138. *TV Interface Devices*. The *Notice* proposed to delete the limits applied to RF signals that are conducted over the output connecting cable of a TV interface device. Additional changes to TV interface devices, such as the type of equipment authorization that should be applied to cable system terminal devices and the level of attenuation needed for transfer switches were addressed in the comments. However, regulations concerning TV interface devices, including output signal limits, cable terminal devices and transfer switches, were recently finalized by the Commission in Docket No. 85-301 [55] and Docket No. 87-107. [56] As the regulations applicable to TV interference devices were considered in those earlier proceedings, the rules adopted in those proceedings will be incorporated into this Order.

139. *TV Broadcast Receivers*. Upon further consideration, we have decided to retain the definition contained in our current rules for a television broadcast receiver. Our proposed definition would have required that TV receivers be designed to receive both television pictures and sound, whereas the current definition requires only the reception of television pictures. We recognize that in the future some television broadcast receivers may be designed to receive only the video transmission, with the audio signal being provided by a separate receiver. Under such circumstances, the video-only receiver would not fall within our proposed definition of a television broadcast receiver and, therefore, the all-channel tuning requirements [57] would not apply. We continue to believe that it is important to require television receivers to comply with the all-channel tuning regulations, even if those receivers are not designed to receive the audio portion of the television transmission. This is accomplished by retaining the current definition of a television broadcast receiver.

140. We are adopting a minor change to the rules for TV broadcast receivers. Under Section 15.66(d) of the current regulations, when a TV tuner is built-in as part of a video tape recorder which uses a power splitter between the antenna terminals of the video tape recorder and the input terminals of the TV tuner, 4 dB may be subtracted from the noise figure measured at the antenna terminals of the video tape recorder. [58] This 4 dB allowance is to compensate for the effect of the power splitter. Since implementation of this regulation, we have observed that some TV broadcast receivers are being manufactured with more than one UHF tuner to allow operational features such as split-screen viewing. If a TV broadcast receiver incorporates more than one UHF tuner with a power splitter between the antenna terminals of these tuners, we are permitting this same 4 dB allowance to the noise figure measurement taken at the antenna terminals of the receiver. [59]

141. *Exemption for Digital Devices with Low Power Consumption.* In the *Notice*, we proposed to exempt digital devices with a power consumption not exceeding 6 nW from the technical standards, including the authorization, testing and importation requirements. [60] Similarly, we proposed to exempt quartz watches and clocks, modules of quartz watches and clocks, musical greeting cards, and battery powered, hand-held calculators and electronic games not requiring connection to the AC power lines. In its comments, Linear objects to the exemption from the importation requirements for electronic games, stating that there is no apparent difference in interference potential between such games and radio receivers. We disagree with Linear's position. Electronic games operate at much lower frequencies than radio receivers and must be battery operated to qualify under the exemption. As discussed earlier in this Order, the predominate source of lower frequency emissions, i.e., those below 30 MHz, are from the AC power lines. Radio receivers generate emissions at considerably higher frequencies. These higher frequency emissions can radiate effectively from the receiver, regardless of whether or not the receiver is connected to the AC power lines. Because of their low power consumption, the devices proposed for exemption have a low potential for causing interference to the authorized service, and, therefore, it is not necessary to subject them to the authorization, testing and importation requirements. Thus, we are adopting our proposal. This action is consistent with the Public Notice released by our Field Operations Bureau on May 13, 1987. [61]

142. *Radio Frequency Defined to 9 kHz.* The *Notice* proposed to change the definition of radio frequency energy, and the associated definition of digital devices, to include devices operating as low as 9 kHz instead of the current specification of 10 kHz. AT&T and Spectrum Measurement Corp. object to this proposal. Spectrum Measurement Corp. indicates that a number of digital devices, i.e., switching power supplies, were designed with clock rates between 9 kHz and 10 kHz in order to avoid placement under the standards for digital devices. The change to 9 kHz was proposed in the *Notice* to correspond to the change in the definition of radio frequency energy contained in the 1979 Final Acts of the World Administrative Radio Conference, making our rules consistent with international standards. [62] Further, the band 9-10 kHz is allocated for radionavigation and must be protected from interference from Part 15 devices. Thus, a change to the definition of radio frequency energy to include emissions between 9-10 kHz is being adopted in this Order. However, manufacturers are being allowed up to five years before digital devices operating within the band 9-10 kHz must comply with the regulations.

143. *Requests for Allocation of Spectrum.* SEIA, along with a number of manufacturers of control and security alarm devices, requests the Commission to allocate specific frequencies for their equipment, particularly security and life-safety equipment. SEIA requests that we recognize a priority right for Part 15 security and life safety devices to operate in designated frequency segments with protection against interference from any non-safety related devices. Rollins states that the time has come for the Commission to recognize the control and security alarm industry and that it should establish a group of frequencies that they can use with recognition of their use as a valid radio service. These requests involve frequency allocation issues and, therefore, are beyond the scope of this proceeding. Accordingly, we will not address them herein.

VI. TRANSITION TIMES FOR COMPLYING WITH THE NEW RULES

144. As with any significant revision of a long standing regulatory process, it will be necessary for manufacturers to make changes in some Part 15 devices that currently are being marketed. To the extent possible, we have attempted to anticipate the problems that may arise. In the *Notice*, we proposed to provide lengthy transition periods in cases where manufacturers are required to build to tighter standards. More specifically, we proposed to allow receivers to be manufactured and imported under the current regulations for a period of ten years. A similar ten year transition period was proposed for intentional radiators operating at 27 MHz and 49 MHz and for cordless telephones. The possibility of a ten year transition period for other affected devices was raised in the *Notice*.

145. None of the comments objected to the ten year transition period proposed for receivers. The manufacturers of control and security alarm device transmitters, e.g., DORCMA, GM, Genie, ITI, Linear, SEIA and Stanley, request that they be provided the same ten year period allowed for receivers. Linear argues that a long transition time is needed to amortize investment in current designs and tooling, to create new, compliant designs and to obtain the required lines of supply and tools for production. NTIA comments that there should be no transition periods for devices using the new bands made available in this proceeding.

146. As proposed in the *Notice*, we are adopting a ten year transition period for receivers. Because of the significant changes being made to the standards applied to receivers, a longer period is necessary to allow manufacturers to create new, compliant designs. Accordingly, we will allow such receivers to be imported, manufactured domestically and authorized under the existing regulations for a period of ten years following the effective date of this Order. We have not specified an earlier date by which receivers must be authorized to show compliance with the new rules. However, the importers and manufacturers should note that it is their responsibility to determine at what time authorization under the standards adopted in this Order should be obtained. We do not plan to grant any extensions to the manufacture and importation transition period based on the date that authorization was obtained on a receiver. It should be noted that if a

receiver is associated with a transmitter operating under regulations that were not in effect prior to the adoption of this Order, no transition period is being implemented for that receiver. Obviously, such receivers must be designed concurrently with the transmitters and matters such as redesign and retrofitting are not relevant.

147. We are not adopting the ten year transition provisions specifically proposed in the *Notice* for cordless telephones or intentional radiators operating at 27 or 49 MHz. Paragraph 46, *supra*, provides the reasons why this lengthy transition provision is no longer needed for cordless telephones and intentional radiators operating in the 49 MHz band. For intentional radiators operating in the 27 MHz band, the regulations being adopted would not require significant modifications to existing devices, allowing the implementation of a shorter transition provision. For operation in the 27 MHz band, we are retaining the current application of average emission measurements, as indicated in paragraph 34, *supra*. In addition, while we have reduced the levels of unwanted emissions permitted from these devices, we have expanded the existing frequency band to permit operation anywhere within the band 26.96-27.28 MHz. This expansion provides "guard bands", within which currently designed equipment would no longer be required to reduce unwanted emissions. These "guard bands" facilitate the ability of currently designed equipment to comply with the limits on unwanted emissions that are being adopted.

148. We do not believe that it is necessary to provide a ten year period for implementation of the new Part 15 rules for Part 15 devices other than receivers. First, the new rules permit transmitters to operate with higher levels of radiated emissions and therefore a greater potential for causing interference. Second, technical standards for transmitters and unintentional radiators (other than receivers) have not been significantly changed. Thus, the degree of redesign needed to bring these devices into compliance with the new rules is not great. The major change to the regulations that would most likely require the redesign of a product is the adoption of additional restricted bands. The interference protection to be provided to services operating in the restricted bands should be instituted as soon as feasible. Third, in the previously cited *Report and Order* in Docket No. 86-422, the manufacturers of control and security alarm devices, in response to a Commission proposal to adopt emission limits for their devices, indicated that transition times of 24 months on obtaining a new grant of equipment authorization and 30 months on manufacturing and importation was acceptable. Thus, we believe that a general ten year transition period for intentional radiators is unreasonable.

149. Based on these considerations, except for receivers, we will continue to grant authorizations and permit verification of Part 15 devices that meet the previous standards for a period of three years after the effective date of this *Report and Order*. However, except for receivers, within five years of the effective date of this action, any Part 15 equipment that is manufactured domestically or imported must comply with the new rules. These transition provisions are not expected to present any substantial hardships to the manufacturers of Part 15 devices. However, delegated authority is being granted to the Chief Engineer to provide limited extensions of no more than two years to the transition provisions for those situations where it is shown that additional time is needed.

CONCLUSION

150. The actions being taken in this *Report and Order* represent the Commission's best judgements as to the trade-offs between beneficial low power spectrum use and possible interference to the authorized radio services. We recognize that certain increased risks of interference to authorized devices may result from altering our regulations. However, the rules we are adopting are intended to minimize this interference potential. The field strength limits being adopted for general operation on the frequencies allocated to aviation, public safety, land mobile and most other frequency bands used by the authorized services are the same as those now applied to residential computer products, and those products have not proven to be a major source of interference complaints. In addition, this Order establishes a number of restricted frequency bands, applicable to all Part 15 intentional radiators, in order to provide additional protection to the allocated radio services. Further, except for non-residential perimeter protection systems currently allowed under the rules, we are not permitting the operation under the general limits of transmitters in the TV broadcast bands. On balance, we believe that the public interest benefits of the rule changes being adopted outweigh the potential for increased interference. Since we will be allowing large numbers of new devices on new frequencies, we will be closely monitoring, through the equipment authorization process, the interference potential of these devices. If this discovery process reveals potential interference problems, the limits adopted in this proceeding will be revisited.

151. Certain matters either raised in the *Notice* or subsequently brought to our attention require further review. Additional proceedings may be expected to address such issues as standards that should be applied to kits of radio frequency devices, definitions applicable to digital equipment, spread spectrum operation above 900 MHz, the labelling of verified devices to indicate the identity of the responsible party, and expedited proceedings to resolve cases of widespread interference.

PROCEDURAL MATTERS

152. Pursuant to the Regulatory Flexibility Act of 1980, 5 USC 601 *et seq.*, the following final flexibility analysis has been prepared:

I. Need for and purpose of the rules.

The regulations pertaining to the operation of a radio frequency device without an individual license were incrementally promulgated over the last 35 years resulting in device-specific regulations, inequities in technical standards between devices with similar interference potentials, standards that may be too strict or that have become too lax, and regulations that appear to be confusing to the general public. The existing regulations also prohibit a number of radio frequency operations that could be permitted without unduly increasing the potential for interference to authorized radio services. The Commission is adopting a comprehensive revision of the Part 15 rules to resolve these problems in the existing rules.

II. Summary of issues raised by public comments in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result.

No commenting parties raised issues specifically in response to the initial regulatory flexibility analysis. The regulations being adopted in this *Report and Order* relax certain standards and apply tighter limits to others. The proposed regulations are technically and economically achievable without undue burden on any entity and are designed to provide the public and industry with additional flexibility in using radio frequency energy for consumer oriented applications without significantly increasing the potential for interference to the authorized services. In many cases, the potential for interference to the authorized services will be decreased by this action. Because these changes to the regulations will result in impact to a number of manufacturers, requiring redesign of their equipment, liberal transition provisions are being adopted. These transition provisions will lessen the impact to manufacturers, allowing many types of devices to be cycled through numerous design changes before compliance with the regulations adopted by this *Report and Order* is required.

III. Significant alternatives considered.

The Commission has considered all of the alternatives presented in this proceeding and has adopted standards that can be achieved by industry while still protecting authorized users of the radio spectrum from interference. Alternatives include deleting all emission standards and restrictions on the marketing of non-complying equipment, retaining the present regulations, adopting the regulations proposed in the *Notice of Proposed Rule Making*, adopting tighter standards than proposed, or a combination of these.

153. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

ORDERING CLAUSES

154. Accordingly, IT IS ORDERED that under the authority contained in Sections 4(i), 301, 302, 303(e), 303(f), 303(r), 303(s), 304 and 307 of the Communications Act of 1934, as amended, Parts 2 and 15 of the Commission's Rules and Regulations ARE AMENDED as set forth in Appendix B below. These rules and regulations are effective **June 23, 1989.**

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Comments on GEN Docket No. 87-389 were received from the following:

Phil Adamsak

ADC Telecommunications, Inc. (ADC)

Aerospace & Flight Test Radio Coordinating Council (AFTRCC)

Amador Corporation (Amador)

Ambico, Inc.

Allen-Bradley Company (Allen-Bradley)

American Radio Relay League, Incorporated (the League)

American Telephone and Telegraph Company (AT&T)

Michael St. Angelo

Clifford J. Appel

Arizona Dept. of Transportation (AZDOT)

The Association of American Railroads (AAR)

The Association of Maximum Service Telecasters (MST)

The Association of North American Radio Clubs (ANARC)

Robert M. Ayers

Vincent Bafetti

Gregory A. Baker

Peter Thomas Baldwin

Herbert F. Barnes

C. O. Bennett

Joseph Bennett

Marianne Bense

James A. Betteley

Gerald W. Bishop

Homer P. Blincoe (with Electromagnetic Sciences, Inc.)

Ronold H. Bofeth

Harold F. Bower

Wayne V. Britton

E. Miles Brown

R. J. Brown

Timothy P. Brown

J. L. Browning

James C. Brownlee, Jr.

John W. Bryant

Robert A. Burbe

Gene Burton

Michael Butts

Cliff Buttschardt

David G. Cantor

Donald Carr

Michele Carr

Richard S. Carroll

James A. Carson

The Chamberlain Group, Inc. (Chamberlain)

Henri J. Chapdelaine

George N. Christoff

Rolan O. Clark (President, Fredrick Amateur Radio Club)

Carl Clawson

Oscar E. Clinton

Thomas L. Collinvitti

The Computer and Business Equipment Manufacturers Association (CBEMA)

Computer Contact Corporation

COMSAT Amateur Radio Club (CARC)

Control Data Canada (CDC)

Eileen A. Cook

John G. Cook

Jeffrey L. Cooper

Lewis R. Coulborn

James O. Cowee

Daniel O. Craig

Lester D. Crawford

Harry A. Crespy

Dennis R. Curry

Kenneth A. & Barbara J. Czarniecki

Michael A. Czuhajewski

Dallas Semiconductor (Dallas)

Douglas L. Datwyler

Robert Davidson

Carlton Davis

L. S. Davis, Jr.

Donald F. Deakin

Edward C. Deichler

Philip DeJarlais

Louis J. Devillon

David R. DeSpain

Warren J. Dickie

Tony DiFlorio

Digital Equipment Corporation (Digital)

David G. Doernberg

Door Operator and Remote Controls Manufacturers Association (DORCMA)

Dennis G. Douglas

Joan Drezhlo

Silas T. Dunn III

William K. Dvorak

Jimmie D. Edrington

Electronic Industries Association, Consumer Electronics Group (EIA/CEG)

Electronic Industries Association, Land Mobile Radio Section (EIA/LMRS)

Electronic Industries Association, Personal Communications Section (EIA/PCS)

Electronic Industries Association of Japan, EMC Overseas (Standards and Regulations) Steering Committee for Consumer Electronic Equipment (EIAJ)

Jeff Elson

EnScan, Inc. (EnScan)

Epstein Associates

Barbara B. Erbacher

Frank C. Erbacher

Thomas A. Farr

J. Trent Felten

William J. Fernandez

Kenneth D. Fields

Fifth Generation Audio

Fisher Research Laboratory (Fisher)

Joseph J. Fitzgerald

Terry E. Flach

William F. Flynn

Gerald M. Foley

Mark M. Forbes

Mark S. Fosella

Congressman Barney Frank

Carl Frank

Robert J. Frediani

Free State Amateur Radio Club

John F. Gallagher

Martin H. Gallas

William R. Gardner

Edward T. Gelinas

Gemini Industries, Inc.

General Electric Company (GE)

General Instrument Corporation (GIC)

General Motors Research Corporation (GM)

The Genie Company, A Division of North American Philips Corp. (Genie)

George Jacobs & Associates, Inc.

Geostar Corporation (Geostar)

Gillespie, Prudhon & Associates, Inc. and Wilkens Engineering

E. A. Gillis

Paul & Mary Gilmore

Great River Amateur Radio Club

Gary L. Grebus

Chas. H. Green

S. R. Griffiths, et al (petition)

David Guimont
Leanore Guimont
Bill Hafner
Dean W. Hagerty
John Roulstone Hall
Roger P. Hancock
F. M. Hemrich
Timothy Hendel
Ruth M. Hesch
Corydon L. Hine
Frank D. Hixon
Jeffrey A. Horn
Arthur J. Horswill Jr.
James R. Hough, Jr.
Bruce S. Howard
Thomas P. Hughes
Leo L. Hunter
Fred E. Huntley
C. Vernon Hyson
Independence Amateur Radio Club
Independent Data Communications Manufacturers Association (IDCMA)
Interactive Technologies, Inc. (ITI)
Intercollegiate Broadcasting System, Inc. (IBS)
International Business Machines Corporation (IBM)
Daniel Jackson
James L. Jarvis
Jerold R. Johnson
Johnson County Radio Amateurs Club
William S. Karn
Vern Kaspar
Fred Dennis Kedjierski
Francis A. Keegan
Bernhard E. Keiser
Federick Kelcz
Carl Keller
Christopher Kelly
Thomas M. Kinahan, Jr.
Glenn A. King
James M. Kiskis
Kevin J. Klein
Honorable Burton W. Knight, II
Richard Konecny
Dennis J. Kosakowski
Larry Lambert
Richard E. Lambert
Carl J. La Monica
Donald B. Lawson
Timothy Leanhan
James G. Lee
Fred Lehman
George F. Levy
Karl E. Lewis
Noland L. Lewis
William B. Lill
Linear Corporation (Linear)
William A. Lippman, Jr.
Albert S. Lobel
Loc Rad, Inc. (Loc Rad)
Barry A. Lowry
LPB Inc. (2 comments filed)
Peter D. Macripo
Timothy M. Maksymczak
Mammoth Cave Amateur Radio Club
Louis J. Marotta
Timothy R. & Helen J. Marsh & Arthur P. Kay
Keith Martin
Michael A. McCarthy
Ginger Elizabeth McCausey
Don McClure, Jr.
John McCullough
Jim D. McIntosh
Thomas A. McKee
William L. McNabb, Sr.
Carl H. Menne
C. H. Merrell
Charles J. Michaels
Micrilor, Inc.
Michael Mideke
John A. Milhoan
3M Dynatel Systems Division (Dynatel)
Craig V. Moore
Don Moore
James V. Morgan, Jr.
Daniel Mrock
Gregory J. Mumley
David Murphy
James J. Murphy
R. Donald Murray
National Academy of Sciences' Committee on Radio Frequencies (CORF)
National Association of Broadcasters (NAB)
National Cable Television Association, Inc. (NCTA)
National Electrical Manufacturers Association (NEMA)
Greg J. Nazarow

NCR Corporation (NCR)
John Neary
NEC Information Systems, Inc. (NECIS)
Darrell Neft
Nicholas A. Nelson
W. S. Neustadter
Nitech, Inc. (Nitech)
Robert D. Null
Bernard M. Oliver
Michael Ortlieb
John Osborne
Donald R. Palko
Gerald L. Park
Kermit R. Parker
Floyd X. Passmore
PA Technology
Harry B. Payne, Jr.
Alan Perkins
Pico Macom, Inc. (Pico)
Pioneer Communications of America, Inc. (PCA)
Pittway Corporation, under their division, Alarm Device Manufacturing Company (Pittway)
Henry Pokorny
Martin A. Prehm
Public Broadcasting Service (PBS)
Al Quaglieri
Stanley F. Quayle
Charles E. Quentel
Rabbit Systems, Inc. (RSI)
RADAR Inc. (RADAR)
Radio Listed Services
A Radio Repair Man
Radio Road Inc.
Radio Telecom and Technology, Inc. (RTT)
Vincent Reh
Arthur B. Reis
RF Monolithics, Inc. (RFM)
Richard W. Burden Associates
Marc Richman
Donna Kay Ring
Rockwell International Corporation (Rockwell)
Henry C. Rodewald
Charles J. Ross
Thomas Allen Rounds
P. J. Rovero
Werner Rueggeberg
Gene P. Rybolt
Joseph E. Saloka
Kit Sagendorf
Martin C. Sagendorf
Salient Communications Company (Salient)
San Juan County ARES and SJC Radio Club
Stanley John Scalsky
Luther G. Schimpf
Schlage Electronics (Schlage)
Schlumberger, Sangamo Energy Management Division
Joseph J. Schroeder, Jr.
Mary E. Schneider
Erich Schulman
Security Equipment Industry Association (SEIA)
Sensormatic Electronics Corporation (Sensormatic)
Senstar Corporation (Senstar)
SETI Institute
Shenandoah Valley Amateur Radio Club, Inc.
John D. Shoemaker
David Alkire Smith
Mark J. Smith
Thomas W. Smith
Society for Promotion of Amplitude Modulation (SPAM)
Southern California Repeater and Remote Base Association (SCRRBA)
Spectrum Measurement Corporation
Roger G. Spindler
Stanley Electronics (Stanley)
Mitchell Stern
Merrill G. Stiles
David S. A. Stine
Paul M. Stirling
Kenneth E. Stone
Ernest N. Storrs
Kenneth E. Stringham Jr.
Truman J. Sylvester
John A. Taflan, II
Tandy Corporation (Tandy)
Craig N. Teerlink
Glenn Thomas
Thomson Consumer Electronics, Inc. (Thomson CE)
James A. Thornton, et. al.
James K. Thorusen
Transcience Industries (Transcience)
Stephen Trapp
Herb D. Twitchell
U. S. Department of Commerce, National Telecommunications and Information Administration (NTIA) (3 comments)

U. S. Department of the Interior

U. S. Department of Transportation, U. S. Coast Guard (USCG)

Arthur L. Usher

Utility Tool Company (Utility Tool)

Hector Valinzuela

Vernon Valero

Victor Voss

Robert H. Walker

Richard Warren

Washington Area DX Association (WADXA)

J. Allan Waters

Allen Watson

Ronald H. Wenig

John F. Werner, III

Douglas White(unreadable)

Whitewater Hills Amateur Radio Club Inc.

John Wiley

Stephen Wilmet

James C. Wiskow

Mike Witenko

Karl F. Witter

WNMQ, Inc.

Raymond Wolfe

John R. Wright

Harold E. Wyer

Matthew E. Zilmer

Reply comments on Gen. Docket No. 87-389 were received from the following:

Aerospace & Flight Test Radio Coordinating Council (AFTRCC)

Allen-Bradley Company (Allen-Bradley)

Amador Corporation (Amador)

American Council of Independent Laboratories, Inc. (ACIL)

American Radio Relay League, Inc. (the League)

American Telephone and Telegraph Company (AT&T)

Aox Inc.

ARNAV Systems, Inc.

Association of Maximum Service Telecasters (MST)

Association of North American Radio Clubs (ANARC)

Edward V. Breeden III

David R. Burnett

The Chamberlain Group, Inc. (Chamberlain)

Checkpoint Systems, Inc. (Checkpoint)

Robert A. Christensen

Cincinnati Bell Telephone Company

Richard Terrance Colgan

The Computer and Business Equipment Manufacturers Association (CBEMA)

Control Data Canada, Ltd. (CDC)

Door Operator and Remote Controls Manufacturers Association (DORCMA)

Electronic Industries Association, Consumer Electronics Group (EIA/CEG)

Gambatte Inc.

William R. Gardner

General Electric Company (GE)

General Instrument Corp. (GIC)

General Motors Research Corporation (GM)

Honeywell Inc. (Honeywell)

Independent Data Communications Manufacturers Association, Inc. (IDCMA)

International Business Machines Corporation (IBM)

Linear Corporation (Linear)

Metrotech

3M Dynatel Systems Division (Dynatel)

National Academy of Sciences' Committee on Radio Frequencies (CORF)

National Association of Broadcasters (NAB)

National Association of State Aviation Officials (NASAO)

National Burglar & Fire Alarm Associates, Inc.

National Business Aircraft Association, Inc. (NBAA)

National Electrical Manufacturers Association (NEMA)

O'Neill Communications, Inc. (OCI)

PA Consulting Group

Pittway Corporation (Pittway)

Public Broadcasting Service (PBS)

Rabbit Systems, Inc. (RSI)

Radio Technical Commission for Maritime Services (RTCM)

Rollins, Inc. (Rollins)

Security Equipment Industry Association (SEIA)

Sensormatic Electronics Corporation (Sensormatic)

Senstar Corp. (Senstar)

Stellar Systems Inc. (Stellar)

Tandy Corporation (Tandy)

Texas Instruments, Inc. (TI)

U. S. Department of Commerce, National Telecommunications and Information Administration (NTIA)

U. S. Department of Transportation, Federal Aviation Administration (FAA)

Utilities Telecommunications Council (UTC)

Wild Goose Association

Zenith Electronics Corporation (Zenith)

APPENDIX B

A. Title 47 of the Code of Federal Regulations, Part 2, is amended as follows:

1. The authority citation for Part 2 continues to read as follows:

Authority: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, and 307, unless otherwise noted.

2. Section 2.801 is amended by revising paragraph (b) to read as follows:

Section 2.801 ***Radiofrequency device defined.***

* * * * *

(b) The incidental, unintentional and intentional radiators defined in Part 15 of this Chapter.

* * * * *

3. Section 2.805 is revised to read as follows:

Section 2.805 ***Equipment that does not require Commission approval.***

In the case of a radio frequency device that, in accordance with the rules in this Chapter, does not have to have a grant of equipment authorization issued by the Commission, e.g., a device subject to verification, but, nevertheless, must comply with specified technical standards prior to use, no person shall sell or lease, or offer for sale or lease (including advertising for sale or lease), or import, ship or distribute for the purposes of selling or leasing or offering for sale or lease, any such radio frequency device unless, prior thereto, such device complies with the applicable administrative and technical provisions (including verification of the equipment, where required) specified in the Commission's rules.

4. Section 2.806 is amended by revising the title and text to read as follows:

Section 2.806 ***Exemption for a digital device.***

(a) Notwithstanding the provisions in Section 2.805, the announcement and offer for sale of a digital device, subject to verification under the provisions in Part 15 of this Chapter, that is in the conceptual, developmental, design or preproduction stage is permitted prior to verification of compliance, *provided* the prospective buyer is advised in writing at the time of announcement or offer for sale that such equipment is subject to the FCC rules and that such equipment shall comply with the appropriate FCC rules before final delivery to the buyer or to centers of distribution.

(b) Parties responsible for verification of Class A digital devices, as defined in Part 15 of this Chapter, shall have the option of ensuring compliance with the applicable technical specifications of this Chapter at each end user's location after installation, provided that the purchase or lease agreement includes a proviso that such a determination of compliance be made and is the responsibility of the party responsible for verification of the equipment.

(c) A digital device subject to the provisions of this Chapter may be operated prior to a determination of compliance under the following conditions:

(1) Any digital device may be operated for the purpose of compliance testing.

(2) Any digital device may be operated for the purpose of demonstration at a trade show provided there is displayed a conspicuous notice that the device has not been tested for compliance. If a digital device subject to verification is offered for sale or lease at the show, the provisions of Section 2.806(a) shall apply. A digital device subject to a grant of equipment authorization from the Commission may not be offered for sale or lease prior to issuance of the grant of authorization by the FCC, but may be advertised or displayed as provided by Section 2.803.

(3) Any digital device may be operated at the manufacturer's facilities during developmental, design or preproduction states for evaluation of product performance and determination of customer acceptability.

(4) Where customer acceptability of a Class A digital device cannot be determined at the manufacturer's facilities because of size or unique capability of the device, that device may be operated at the user's site during development, design or preproduction stages for evaluation of product performance and determination of customer acceptability.

(5) For the purpose of paragraphs (c)(3) and (c)(4) of this Section, the manufacturer's facilities are considered to include the facilities of the party responsible for compliance with the regulations, the manufacturer, and other entities working under the authorization of the responsible party in connection with the development and manufacture, but not marketing, of the equipment.

5. Section 2.909 is redesignated as Section 2.911.

6. Section 2.910 is redesignated as Section 2.913.

7. A new Section 2.909 is added before the heading "Application Procedures for Equipment Authorizations", to read as follows:

Section 2.909 ***Responsible party.***

The following parties are responsible for the compliance of radio frequency equipment with the applicable technical standards after a grant of equipment authorization is issued by the Commission or the equipment is verified:

(a) In the case of equipment which requires the issuance by the Commission of a grant of equipment authorization, the party to whom that grant of authorization is issued (the grantee).

(b) In the case of equipment subject to authorization under the verification procedure, the manufacturer or, in the case of imported equipment, the importer.

8. A new Section 2.948 is added to read as follows:

Section 2.948 ***Description of measurement facilities.***

(a) Each party making measurements of equipment that is subject to an equipment authorization under Part 15 or Part 18 of this Chapter, regardless of whether the measurements are filed with the Commission or kept on file by the party responsible for compliance of equipment marketed within the U. S. or its possessions, shall compile a description of the measurement facilities employed.

(1) If the measured equipment is subject to the verification procedure, the description of the measurement facilities shall be retained by the party responsible for verification of the equipment.

(i) If the equipment is verified through measurements performed by an independent laboratory, it is acceptable for the party responsible for verification of the equipment to rely upon the description of the measurement facilities retained by or placed on file with the Commission by that laboratory. In this situation, the party responsible for verification of the equipment is not required to retain a duplicate copy of the description of the measurement facilities.

(ii) If the equipment is verified based on measurements performed at the installation site of the equipment, no specific site calibration data is required. It is acceptable to retain the description of the measurement facilities at the site at which the measurements were performed.

(2) If the equipment is to be authorized by the Commission under the certification or the notification procedure, the description of the measurement facilities shall be filed with the Commission's Laboratory in Columbia, Maryland. The data describing the measurement facilities need only be filed once but must be updated as changes are made to the measurement facilities or as otherwise described in this Section. At least every three years, the organization responsible for filing the data with the Commission shall certify that the data on file is current.

(b) The description shall contain the following information:

(1) Location of the test site.

(2) Physical description of the test site accompanied by photographs 8" x 10" in size. Smaller photographs may be used if they clearly show the details of the test site and are mounted on full size sheets of paper.

(3) A drawing showing the dimensions of the site, physical layout of all supporting structures, and all structures within 5 times the distance between the measuring antenna and the device being measured.

(4) Description of structures used to support the device being measured and the test instrumentation.

(5) List of measuring equipment used.

(6) Information concerning the calibration of the measuring equipment, i.e., the date the equipment was last calibrated and how often the equipment is calibrated.

(7) If desired, a statement as to whether the test site is available to do measurement services for the public on a fee basis.

(8) A plot of site attenuation data taken pursuant to FCC Bulletin OET 55 using a tuned dipole antenna (this provision does not apply to equipment that is not measured on an open field test site).

(9) A description of the types of equipment intended to be measured or other information regarding the types of measurements that would be performed at the test facility.

(c) The Commission will publish a list of those parties who have filed the information required by this section, provided they indicate that they wish to perform measurement services for the public on a fee basis. However, it should be noted that the Commission does not endorse or approve any facility on this list.

9. Section 2.955 is amended by adding new paragraphs (a)(3) and (a)(4) to read as follows:

Section 2.955 ***Retention of records.***

(a) * * *

(3) A record of the measurements made on an appropriate test site that demonstrates compliance with the applicable regulations. The record shall identify the measurement procedure that was used and shall include all the data required to show compliance with the appropriate regulations.

(4) For equipment subject to the provisions in Part 15 of this Chapter, the records shall indicate if the equipment was verified pursuant to the transition provisions contained in Section 15.37 of this Chapter.

* * * * *

10. Section 2.975 is amended by revising paragraph (a)(5) and by adding new paragraphs (a)(7), (f) and (g) to read as follows:

Section 2.975 ***Application for notification.***

(a) * * *

(5) For devices operated under the provisions of Part 15 of this Chapter, photographs showing the general appearance and the controls available to the user. Photographs should be 8 by 10 inches in size. Smaller photographs may be submitted provided they are sharp and clear, show the necessary detail, and are mounted on paper between 8 by 10 1/2 inches and 8 1/2 by 11 inches. Line sketches may be submitted in lieu of photographs provided those sketches are sufficiently detailed to allow identification of the equipment. For devices operated under the provisions of any other Part and where it is specifically required under the rule section(s) under which the device is to be operated, photographs of the equipment of sufficient clarity to reveal its external appearance and size, both front and back;

* * * * *

(7) For equipment subject to the provisions of Part 15 of this Chapter, the application shall indicate if the equipment is being authorized pursuant to the transition provisions in Section 15.37 of this Chapter.

* * * * *

(f) For a composite system that incorporates only devices subject to certification, verification and/or notification and that are contained in a single enclosure, a separate application, FCC Form 731, with the appropriate fee shall be submitted for each type of device within the enclosure. At the option of the applicant, a single FCC identifier may be requested for that system. Fees are based on the number of devices and types of authorizations.

(g) The records of measurement data, measurement procedures, photographs, circuit diagrams, etc. for the device to which the application applies shall be retained for two years after the manufacture of said equipment has been permanently discontinued, or until the conclusion of an investigation or proceeding if the holder of the grant of equipment authorization is officially notified that an investigation or any other administrative proceeding involving the equipment has been instituted.

11. Section 2.1033 is amended by revising paragraphs (b) and (c) and by adding new paragraphs (b)(1) through (b)(10) to read as follows:

Section 2.1033 ***Application for certification.***

* * * * *

(b) The application shall be accompanied by a technical report containing the following information:

(1) The full name and mailing address of the manufacturer of the device and the applicant for certification.

(2) FCC identifier.

(3) A copy of the installation and operating instructions to be furnished the user. A draft copy of the instructions may be submitted if the actual document is not available. The actual document shall be furnished to the FCC when it becomes available.

(4) A brief description of the circuit functions of the device along with a statement describing how the device operates. This statement should contain a description of the ground system and antenna, if any, used with the device.

(5) A block diagram showing the frequency of all oscillators in the device. The signal path and frequency shall be indicated at each block. The tuning range(s) and intermediate frequency(ies) shall be indicated at each block. A schematic diagram also is required for intentional radiators.

(6) A report of measurements of radiated and conducted emissions. This shall identify the test procedure used (e.g., indicate the FCC test procedure used or, if an alternate test procedure was used, a description of the test procedure and the reason it was necessary to use an alternate procedure), the date the measurements were made, the location where the measurements were made, and the device tested (model and serial number, if available). It shall also include a sample calculation showing how the obtained measurements were converted to the levels specified in the applicable rule sections.

(7) A sufficient number of photographs to clearly show the exterior appearance, the construction, the component placement on the chassis, and the chassis assembly. The exterior views shall show the overall appearance, the antenna used with the device (if any), the controls available to the user, and the required identification label in sufficient detail so that the name and FCC identifier can be read. In lieu of a photograph of the label, a sample label (or facsimile thereof) may be submitted together with a sketch showing where this label will be placed on the equipment. Photographs shall be 8 by 10 inches in size. Smaller photographs may be submitted provided they are sharp and clear, show the necessary detail, and are mounted on paper between 8 and 10 1/2 inches and 8 1/2 by 11 inches in size. A sample label or facsimile together with the sketch showing the placement of this label shall be on the same size paper.

(8) If the equipment for which certification is being sought must be tested with peripheral or accessory devices connected or installed, a brief description of those peripherals or accessories. The peripheral or accessory devices shall be unmodified, commercially available equipment.

(9) For equipment subject to the provisions of Part 15 of this Chapter, the application shall indicate if the equipment is being authorized pursuant to the transition provisions in Section 15.37 of this Chapter.

(10) For a device used in decoding the Emergency Broadcast System Attention Signal, as defined in Section 73.906 of this Chapter, the value of the necessary voltage (RMS) or range of voltages of the attention signal to be applied to the input terminals of the decoder which will cause the desired response of the device. In the event that input signals other than the attention signal (excluding signals which in combination form the attention signal), including signals outside this voltage range, will cause false responses by the device, a description of such signals and their input voltage levels that cause such false responses shall be specified in the application and appropriate warnings shall be included in the instructions furnished to the user. The susceptibility of the device to false responses and any lack of reliability in responding to the attention signal at input levels within the rated voltage range may be regarded by the Commission as cause to deny certification.

(c) For a composite system that incorporates only devices subject to certification, verification and/or notification and that are contained in a single enclosure, a separate application, FCC Form 731, shall be submitted with the appropriate fee for each type of device within the enclosure. At the option of the applicant, a single FCC identifier may be requested for that system. Fees are based on the number of devices and types of authorizations.

12. Section 2.1043 is amended by revising paragraphs (a) and (c) and adding a new paragraph (b)(3) to read as follows:

Section 2.1043 ***Changes in certificated equipment.***

(a) Changes to the basic frequency determining and stabilizing circuitry (including clock or data rates), frequency multiplication stages, basic modulator circuit or maximum power or field strength ratings shall not be performed without application for and authorization of a new grant of certification. Variations in electrical or mechanical construction, other than these indicated items, are permitted provided the variations either do not affect the characteristics required to be reported to the Commission or the variations are made in compliance with the other provisions of this Section.

(b) * * *

(3) Permissive changes, as detailed above, shall be made only by the holder of the grant of certification. Changes by any party other than the grantee require a new application for and grant of certification.

(c) A grantee desiring to make a change other than a permissive change shall file an application on FCC Form 731 accompanied by the required fees. The grantee shall attach a description of the change(s) to be made and a statement indicating whether the change(s) will be made in all units (including previous production) or will be made only in those units produced after the change is authorized.

* * * * *

13. Section 2.1201 is amended by adding a new paragraph (c) after the Note to read as follows:

Section 2.1201 ***Purpose.***

* * * * *

(c) The provisions of this Subpart shall not apply to musical greeting cards, quartz watches and clocks, modules of quartz watches and clocks, radio frequency devices (including digital devices) whose radio frequency stage has a power consumption not exceeding 6 nW, hand-held calculators and electronic games that do not require connection to the AC power lines, and digital devices in which both the highest frequency generated and the highest frequency used are less than 1.705 MHz and that do not operate from the AC power lines or contain provisions for operation while connected to the AC power lines.

B. Title 47 of the Code of Federal Regulations, Part 15, is amended as follows:

1. The authority citation for Part 15 is amended to read as follows:

Authority: Sec. 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, 304, and 307.

2. Part 15 is revised in its entirety to read as follows:

PART 15 - RADIO FREQUENCY DEVICES

Subpart A - General

Section 15.1	Scope of this Part.
Section 15.3	Definitions.
Section 15.5	General conditions of operation.
Section 15.7	Special temporary authority.
Section 15.9	Prohibition against eavesdropping.
Section 15.11	Cross reference.
Section 15.13	Incidental radiators.
Section 15.15	General technical requirements.
Section 15.17	Susceptibility to interference.
Section 15.19	Labelling requirements.
Section 15.21	Information to user.
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Section 15.247	Operation within the bands 902 - 928 MHz, 2400 - 2483.5 MHz, and 5725 - 5850 MHz.
Section 15.249	Operation within the bands 902 - 928 MHz, 2400 - 2483.5 MHz, 5725 - 5875 MHz, and 24.0 - 24.25 GHz.
Section 15.251	Operation within the bands 2.9-3.26 GHz, 3.267 - 3.332 GHz, 3.339 - 3.3458 GHz, and 3.358 - 3.6 GHz.

Authority: Sec. 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, 304, and 307.

Subpart A - General

Section 15.1 ***Scope of this Part.***

(a) This Part sets out the regulations under which an intentional, unintentional, or incidental radiator may be operated without an individual license. It also contains the technical specifications, administrative requirements and other conditions relating to the marketing of Part 15 devices.

(b) The operation of an intentional or unintentional radiator that is not in accordance with the regulations in this Part must be licensed pursuant to the provisions of Section 301 of the Communications Act of 1934, as amended, unless otherwise exempted from the licensing requirements elsewhere in this Chapter.

(c) Unless specifically exempted, the operation or marketing of an intentional or unintentional radiator that is not in compliance with the administrative and technical provisions in this Part, including prior Commission authorization or verification, as appropriate, is prohibited under Section 302 of the Communications Act of 1934, as amended, and Subpart I of Part 2 of this Chapter. The equipment authorization and verification procedures are detailed in Subpart J of Part 2 of this Chapter.

Section 15.3 ***Definitions.***

(a) *Auditory assistance device.* An intentional radiator used to provide auditory assistance to a handicapped person or persons. Such a device may be used for auricular training in an educational institution, for auditory assistance at places of public gatherings, such as a church, theater, or auditorium, and for auditory assistance to handicapped individuals, only, in other locations.

(b) *Biomedical telemetry device.* An intentional radiator used to transmit measurements of either human or animal biomedical phenomena to a receiver.

(c) *Cable input selector switch.* A transfer switch that is intended as a means to alternate between the reception of broadcast signals via connection to an antenna and the reception of cable television service.

(d) *Cable locating equipment.* An intentional radiator used intermittently by trained operators to locate buried cables, lines, pipes and similar structures or elements. Operation entails coupling a radio frequency signal onto the cable, pipe, etc. and using a receiver to detect the location of that structure or element.

(e) *Cable system terminal device (CSTD).* A TV interface device that serves, as its primary function, to connect a cable system operated under Part 76 of this Chapter to a TV broadcast receiver or other subscriber premise equipment. Any device which functions as a CSTD in one of its operating modes must comply with the technical requirements for such devices when operating in that mode.

(f) *Carrier current system.* A system that transmits radio frequency energy by conduction over the electric power lines. A carrier current system can be designed such that the signals are received by conduction directly from connection to the electric power lines (unintentional radiator) or the signals are received over-the-air due to radiation of the radio frequency signals from the electric power lines (intentional radiator).

(g) *CB receiver.* Any receiver that operates in the Personal Radio Services on frequencies allocated for Citizens Band (CB) Radio Service stations, as well as any receiver provided with a separate band specifically designed to receive the transmissions of CB stations in the Personal Radio Services. This includes the following: (1) a CB receiver sold as a separate unit of equipment; 2) the receiver section of a CB transceiver; 3) a converter to be used with any receiver for the purpose of receiving CB transmissions; and, 4) a multiband receiver that includes a band labelled "CB" or "11-meter" in which such band can be separately selected, except that an Amateur Radio Service receiver that was manufactured prior to January 1, 1960, and which includes an 11-meter band shall not be considered to be a CB receiver.

(h) *Class A digital device.* A digital device that is marketed for use in a commercial, industrial or business environment, exclusive of a device which is marketed for use by the general public or is intended to be used in the home.

(i) *Class B digital device.* A digital device that is marketed for use in a residential environment notwithstanding use in commercial, business and industrial environments. Examples of such devices include, but are not limited to, personal computers, calculators, and similar electronic devices that are marketed for use by the general public. Note: The responsible party may also qualify a device intended to be marketed in a commercial, business or industrial environment as a Class B device, and in fact is encouraged to do so, provided the device complies with the technical specifications for a Class B digital device. In the event that a particular type of device has been found to repeatedly cause harmful interference to radio commu-

nications, the Commission may classify such a digital device as a Class B digital device, regardless of its intended use.

(j) *Cordless telephone system.* A system consisting of two transceivers, one a base station that connects to the public switched telephone network and the other a mobile handset unit that communicates directly with the base station. Transmissions from the mobile unit are received by the base station and then placed on the public switched telephone network. Information received from the switched telephone network is transmitted by the base station to the mobile unit. Note: The Domestic Public Cellular Radio Telecommunications Service is considered to be part of the switched telephone network. In addition, intercom and paging operations are permitted provided these are not intended to be the primary modes of operation.

(k) *Digital device.* (Previously defined as a computing device). An unintentional radiator (device or system) that generates and uses timing signals or pulses at a rate in excess of 9,000 pulses (cycles) per second and uses digital techniques; inclusive of telephone equipment that uses digital techniques or any device or system that generates and uses radio frequency energy for the purpose of performing data processing functions, such as electronic computations, operations, transformations, recording, filing, sorting, storage, retrieval, or transfer. A radio frequency device that is specifically subject to an emanation requirement in any other FCC Rule Part or an intentional radiator subject to Subpart C of this Part that contains a digital device is not subject to the standards for digital devices, provided the digital device is used only to enable operation of the radio frequency device and the digital device does not control additional functions or capabilities. Note: Computer terminals and peripherals that are intended to be connected to a computer are digital devices.

(l) *Field disturbance sensor.* A device that establishes a radio frequency field in its vicinity and detects changes in that field resulting from the movement of persons or objects within its range.

(m) *Harmful interference.* Any emission, radiation or induction that endangers the functioning of a radio navigation service or of other safety services or seriously degrades, obstructs or repeatedly interrupts a radiocommunications service operating in accordance with this Chapter.

(n) *Incidental radiator.* A device that generates radio frequency energy during the course of its operation although the device is not intentionally designed to generate or emit radio frequency energy. Examples of incidental radiators are dc motors, mechanical light switches, etc.

(o) *Intentional radiator.* A device that intentionally generates and emits radio frequency energy by radiation or induction.

(p) *Kit.* Any number of electronic parts, usually provided with a schematic diagram or printed circuit board, which, when assembled in accordance with instructions, results in a device subject to the regulations in this Part, even if additional parts of any type are required to complete assembly.

(q) *Perimeter protection system.* A field disturbance sensor that employs leaky cables as the radiating source. These cables are installed in a manner that allows the system to detect movement within the protected area.

(r) *Peripheral device.* An input/output unit of a system that feeds data into and/or receives data from the central processing unit of a digital device. Peripherals to a digital device include any device that is connected external to the digital device, any device internal to the digital device that connects the digital device to an external device by wire or cable, and any circuit board or card designed for interchangable mounting, internally or externally, that increases the operating or processing speed of a digital device, e.g., "turbo cards" and "enhancement boards". Examples of peripheral devices include terminals, printers, external floppy disk drives and other data storage devices, video monitors, keyboards, control cards, interface boards, external memory expansion cards and other input/output devices that may or may not contain digital circuitry. However, an internal device that contains the central processing unit of a digital device is not a peripheral even though such a device may connect to an external keyboard or other components.

(s) *Personal computer.* An electronic computer that is marketed for use in the home, notwithstanding business applications. Such computers are considered Class B digital devices. Computers which use a standard TV receiver as a display device or meet all of the following conditions are considered examples of personal computers:

(1) Marketed through a retail outlet or direct mail order catalog.

(2) Notices of sale or advertisements are distributed or directed to the general public or hobbyist users rather than restricted to commercial users.

(3) Operates on a battery or 120 volt electrical supply.

If the responsible party can demonstrate that because of price or performance the computer is not suitable for residential or hobbyist use, it may request that the computer be considered to fall outside of the scope of this definition for personal computers.

(t) *Power line carrier systems.* An unintentional radiator employed as a carrier current system used by an electric power utility entity on transmission lines for protective relaying, telemetry, etc. for general supervision of the power system. The system operates by the transmission of radio frequency energy by conduction over the electric power transmission lines of the system. The system does not include those electric lines which connect the distribution substation to the customer or house wiring.

(u) *Radio frequency (RF) energy.* Electromagnetic energy at any frequency in the radio spectrum between 9 kHz and 3,000,000 MHz.

(v) *Scanning receiver.* For the purpose of this rule Part, this is a receiver that automatically switches among four or more frequencies in the range of 30 to 960 MHz and which is capable of stopping at and receiving a radio signal detected on a frequency. Receivers designed solely for the reception of the broadcast signals under Part 73 of the regulations or for operation as part of a licensed station are not included in this definition.

(w) *Television (TV) broadcast receiver.* A device designed to receive television pictures that are broadcast simultaneously with sound on the television channels authorized under Part 73 of this Chapter.

(x) *Transfer switch.* A device used to alternate between the reception of over-the-air radio frequency signals via connection to an antenna and the reception of radio frequency signals received by any other method, such as from a TV interface device.

(y) *TV interface device.* An unintentional radiator that produces or translates in frequency a radio frequency carrier modulated by a video signal derived from an external or internal signal source, and which feeds the modulated radio frequency energy by conduction to the antenna terminals or other non-baseband input connections of a television broadcast receiver. A TV interface device may include a stand-alone RF modulator, or a composite device consisting of an RF modulator, video source and other components devices. Examples of TV interface devices are video cassette recorders and terminal devices attached to a cable system or used with a Master Antenna (including those used for central distribution video devices in apartment or office buildings).

(z) *Unintentional radiator.* A device that intentionally generates radio frequency energy for use within the device, or that sends radio frequency signals by conduction to associated equipment via connecting wiring, but which is not intended to emit RF energy by radiation or induction.

Section 15.5 ***General conditions of operation.***

(a) Persons operating intentional or unintentional radiators shall not be deemed to have any vested or recognizable right to continued use of any given frequency by virtue of prior registration or certification of equipment, or, for power line carrier systems, on the basis of prior notification of use pursuant to Section 90.63(g) of this chapter.

(b) Operation of an intentional, unintentional, or incidental radiator is subject to the conditions that no harmful interference is caused and that interference must be accepted that may be caused by the operation of an authorized radio station, by another intentional or unintentional radiator, by industrial, scientific and medical (ISM) equipment, or by an incidental radiator.

(c) The operator of a radio frequency device shall be required to cease operating the device upon notification by a Commission representative that the device is causing harmful interference. Operation shall not resume until the condition causing the harmful interference has been corrected.

(d) Intentional radiators that produce Class B emissions (damped wave) are prohibited.

Section 15.7 ***Special temporary authority.***

(a) The Commission will, in exceptional situations, consider an individual application for a special temporary authorization to operate an incidental, intentional or unintentional radiation device not conforming to the provisions of this part, where it can be shown that the proposed operation would be in the public interest, that it is for a unique type of station or for a type of operation which is incapable of being established as a regular service, and that the proposed operation can not feasibly be conducted under this Part.

(b) No authorization is required in order to perform testing of equipment for determining compliance with these regulations. Except as provided in Subpart I of Part 2 of this Chapter, this provision does not permit the providing of equipment to potential users in order to determine customer acceptance of the product or marketing strategy, nor does this provision permit any type of operation other than a determination of compliance with the regulations. During this testing, the provisions of Sections 15.5 and 15.205 apply.

Section 15.9 ***Prohibition against eavesdropping.***

Except for the operations of law enforcement officers conducted under lawful authority, no person shall use, either directly or indirectly, a device operated pursuant to the provisions of this Part for the purpose of overhearing or recording the private conversations of others unless such use is authorized by all of the parties engaging in the conversation.

Section 15.11 ***Cross reference.***

The provisions of Subparts A, H, I, J and K of Part 2 apply to intentional and unintentional radiators, in addition to the provisions of this Part. Also, a cable system terminal device and a cable input selector switch shall be subject to the relevant provisions of Part 76 of this Chapter.

Section 15.13 ***Incidental radiators.***

Manufacturers of these devices shall employ good engineering practices to minimize the risk of harmful interference.

Section 15.15 ***General technical requirements.***

(a) An intentional or unintentional radiator shall be constructed in accordance with good engineering design and manufacturing practice. Emanations from the device shall be suppressed as much as practicable, but in no case shall the emanations exceed the levels specified in these rules.

(b) An intentional or unintentional radiator must be constructed such that the adjustments of any control that is readily accessible by or intended to be accessible to the user will not cause operation of the device in violation of the regulations.

(c) Parties responsible for equipment compliance should note that the limits specified in this Part will not prevent harmful interference under all circumstances. Since the operators of Part 15 devices are required to cease operation should harmful interference occur to authorized users of the radio frequency spectrum, the parties responsible for equipment compliance are encouraged to employ the minimum field strength necessary for communications, to provide greater attenuation of unwanted emissions than required by these regulations, and to advise the user as to how to resolve harmful interference problems (for example, see Section 15.105(b)).

Section 15.17 ***Susceptibility to interference.***

(a) Parties responsible for equipment compliance are advised to consider the proximity and the high power of non-Government licensed radio stations, such as broadcast, amateur and land mobile stations, and of U. S. Government radio stations when choosing operating frequencies during the design of their equipment so as to reduce the susceptibility for receiving harmful interference. Information on non-Government use of the spectrum can be obtained by consulting the Table of Frequency Allocations in Section 2.106 of this Chapter.

(b) Information on U. S. Government operations can be obtained by contacting: Director, Spectrum Plans and Policy, National Telecommunications and Information Administration, Department of Commerce, Room 4096, Washington, D. C. 20230.

Section 15.19 ***Labelling requirements.***

(a) In addition to the requirements in Part 2 of this Chapter, a device subject to certification, notification, or verification shall be labelled as follows:

(1) Receivers associated with the operation of a licensed radio service, e.g., FM broadcast under Part 73, land mobile operation under Part 90, etc., shall bear the following statement in a conspicuous location on the device:

> This device complies with Part 15 of the FCC Rules. Operation is subject to the condition that this device does not cause harmful interference.

(2) A stand-alone cable input selector switch, shall bear the following statement in a conspicuous location on the device:

> This device is verified to comply with Part 15 of the FCC Rules for use with cable television service.

(3) All other devices shall bear the following statement in a conspicuous location on the device:

> This device complies with Part 15 of the FCC Rules. Operation is subject to the following two conditions: (1) this device may not cause harmful interference, and (2) this device must accept any interference received, including interference that may cause undesired operation.

(b) Where a device is constructed in two or more sections connected by wires and marketed together, the statement specified in this Section is required to be affixed only to the main control unit.

(c) When the device is so small or for such use that it is not practicable to place the statement specified in this Section on it, the information required by these paragraphs shall be placed in a prominent location in the instruction manual or pamphlet supplied to the user or, alternatively, shall be placed on the container in which the device is marketed. However, the FCC identifier or the unique identifier, as appropriate, must be displayed on the device.

Section 15.21 ***Information to user.***

The users manual or instruction manual for an intentional or unintentional radiator shall caution the user that changes or modifications not expressly approved by the party responsible for compliance could void the user's authority to operate the equipment.

Section 15.23 ***Home - built devices.***

(a) Equipment authorization is not required for devices that are not marketed, are not constructed from a kit, and are built in quantities of five or less for personal use.

(b) It is recognized that the individual builder of home-built equipment may not possess the means to perform the measurements for determining compliance with the regulations. In this case, the builder is expected to employ good engineering practices to meet the specified technical standards to the greatest extent practicable. The provisions of Section 15.5 apply to this equipment.

Section 15.25 ***Kits.***

A TV interface device, including a cable system terminal device, which is marketed as a kit shall comply with the following requirements:

(a) All parts necessary for the assembled device to comply with the technical requirements of this Part must be supplied with the kit. No mechanism for adjustment that can cause operation in violation of the requirements of this Part shall be made accessible to the builder.

(b) At least two units of the kit shall be assembled in exact accordance with the instructions supplied with the product to be marketed. If all components required to fully complete the kit (other than those specified in paragraph (a) which are needed for compliance with the technical provisions and must be included with the kit) are not normally furnished with the kit, assembly shall be made using the recommended components. The assembled units shall be certified or notified, as appropriate, pursuant to the requirements of this Part.

(1) The measurement data required for a TV interface device subject to certification shall be obtained for each of the two units and submitted with an application for certification pursuant to Subpart J of Part 2 of this Chapter.

(2) The measurement data required for a TV interface device subject to notification shall be obtained for the units tested and retained on file pursuant to the provisions of Subpart J of Part 2 of this Chapter.

(c) A copy of the exact instructions that will be provided for assembly of the device shall be submitted with an application for certification or notification. Those parts which are not normally furnished shall be detailed in the application for equipment authorization.

(d) In lieu of the label required by Section 15.19, the following label, along with the label bearing the FCC identifier and other information specified in Sections 2.925 and 2.926, shall be included in the kit with instructions to the builder that it shall be attached to the completed kit:

> *(Name of Grantee)*
> *(FCC Identifier)*
>
> This device can be expected to comply with Part 15 of the FCC Rules provided it is assembled in exact accordance with the instructions provided with this kit. Operation is subject to the following conditions: (1) this device may not cause harmful interference, and (2) this device must accept any interference received including interference that may cause undesired operation.

(e) For the purpose of this Section, circuit boards used as repair parts for the replacement of electrically identical defective circuit boards are not considered to be kits.

Section 15.27 ***Special accessories.***

(a) Equipment marketed to a consumer must be capable of complying with the necessary regulations in the configuration in which the equipment is marketed. Where special accessories, such as shielded cables and/or special connectors, are required to enable an unintentional or

intentional radiator to comply with the emission limits in this Part, the equipment must be marketed with, i.e., shipped and sold with, those special accessories. However, in lieu of shipping or packaging the special accessories with the unintentional or intentional radiator, the responsible party may employ other methods of ensuring that the special accessories are provided to the consumer, without additional charge, at the time of purchase. Information detailing any alternative method used to supply the special accessories shall be included in the application for a grant of equipment authorization or retained in the verification records, as appropriate. The party responsible for the equipment, as detailed in Section 2.909 of this Chapter, shall ensure that these special accessories are provided with the equipment. The instruction manual for such devices shall include appropriate instructions on the first page of the text concerned with the installation of the device that these special accessories must be used with the device. It is the responsibility of the user to use the needed special accessories supplied with the equipment.

(b) If a device requiring special accessories is installed by or under the supervision of the party marketing the device, it is the responsibility of that party to install the equipment using the special accessories. For equipment requiring professional installation, it is not necessary for the responsible party to market the special accessories with the equipment. However, the need to use the special accessories must be detailed in the instruction manual, and it is the responsibility of the installer to provide and to install the required accessories.

(c) Accessory items that can be readily obtained from multiple retail outlets are not considered to be special accessories and are not required to be marketed with the equipment. The manual included with the equipment must specify what additional components or accessories are required to be used in order to ensure compliance with this Part, and it is the responsibility of the user to provide and use those components and accessories.

(d) The resulting system, including any accessories or components marketed with the equipment, must comply with the regulations.

Section 15.29 ***Inspection by the Commission.***

(a) Any equipment or device subject to the provisions of this Part, together with any certificate, notice of registration or any technical data required to be kept on file by the operator, supplier or party responsible for compliance of the device shall be made available for inspection by a Commission representative upon reasonable request.

(b) The owner or operator of a radio frequency device subject to this Part shall promptly furnish to the Commission or its representative such information as may be requested concerning the operation of the radio frequency device.

(c) The party responsible for the compliance of any device subject to this Part shall promptly furnish to the Commission or its representatives such information as may be requested concerning the operation of the device, including a copy of any measurements made for obtaining an equipment authorization or demonstrating compliance with the regulations.

(d) The Commission, from time to time, may request the party responsible for compliance, including an importer, to submit to the FCC Laboratory in Columbia, Maryland, various equipment to determine that the equipment continues to comply with the applicable standards. Shipping costs to the Commission's Laboratory and return shall be borne by the responsible party. Testing by the Commission will be performed using the measurement procedure(s) that was in effect at the time the equipment was authorized or verified.

Section 15.31 ***Measurement standards.***

(a) The following measurement procedures are used by the Commission to determine compliance with the technical requirements. Copies of these procedures are available from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161 or from the Commission's current duplicating contractor whose name and address are available from the Commission's Consumer Assistance Office.

(1) FCC/OET MP-1:	FCC Methods of Measurements for Determining Compliance of Radio Control and Security Alarm Devices and Associated Receivers.
(2) FCC/OET MP-2:	Measurement of UHF Noise Figures of TV Receivers.
(3) FCC/OET MP-3:	FCC Methods of Measurements of Output Signal Level, Output Terminal Conducted Spurious Emissions, Transfer Switch Characteristics, and Radio Noise Emissions from TV Interface Devices.
(4) FCC/OET MP-4:	FCC Procedure for Measuring RF Emissions from Computing Devices.
(5) FCC/OET MP-9:	FCC Procedure for Measuring Cable Television Switch Isolation.

(b) All parties making compliance measurements on equipment subject to the requirements of this Part are urged to use these measurement procedures. Any party using other procedures should ensure that such other procedures can be relied on to produce measurement results compatible with the FCC measurement procedures. The description of the measurement procedure used in testing the equipment for compliance and a list of the test equipment actually employed shall be made part of an application for certification or included with the data required to be retained by the party responsible for devices subject to notification or verification.

(c) For swept frequency equipment, measurements shall be made with the frequency sweep stopped at those frequencies chosen for the measurements to be reported.

(d) Field strength measurements shall be made, to the extent possible, on an open field site. Test sites other than open field sites may be employed if they are properly calibrated so that the measurement results correspond to what would be obtained from an open field site. In the case of equipment for which measurements can be performed only at the installation site, such as perimeter protection systems, carrier current systems, and systems employing a "leaky" coaxial cable as an antenna, measurements for verification or for obtaining a grant of equipment authorization shall be performed at a minimum of three installations that can be demonstrated to be representative of typical installation sites.

(e) For intentional radiators, measurements of the variation of the input power or the radiated signal level of the fundamental frequency component of the emission, as appropriate, shall be performed with the supply voltage varied between 85% and 115% of the nominal rated supply voltage. For battery operated equipment, the equipment tests shall be performed using a new battery.

(f) To the extent practicable, the device under test shall be measured at the distance specified in the appropriate rule section. The distance specified corresponds to the horizontal distance between the measurement antenna and the closest point of the equipment under test, support equipment or interconnecting cables as determined by the boundary defined by an imaginary straight line periphery describing a simple geometric configuration enclosing the system containing the equipment under test. The equipment under test, support equipment and any interconnecting cables shall be included within this boundary.

(1) At frequencies equal to or above 30 MHz, measurements may be performed at a distance closer than that specified provided this does not result in measurements taken in the near field. When performing measurements at a closer distance than specified, the results shall be extrapolated to the specified distance using an inverse linear distance extrapolation factor (20 dB/decade). Measurement at a distance greater than specified is not permitted unless the responsible party can demonstrate that measurements at the specified distance are impractical because of the size of the equipment, the location of the equipment, or other factors, or unless the responsible party can demonstrate that such a measurement would take place in the near field, as could occur when performing measurements on some large digital devices and perimeter protection systems. Measurements shall not be performed at a distance greater than 30 meters unless it can be demonstrated that measurement at a distance of 30 meters or less is impracticable and, further, that the signal level needed to be determined at the distance employed can be detected by the measuring equipment. When performing measurements at a distance greater than that specified, the results shall be interpolated to the specified distance using an inverse linear distance interpolation factor (20 dB/decade).

(2) At frequencies below 30 MHz, measurements may be performed at a distance closer than that specified in the regulations; however, an attempt should be made to avoid making measurements in the near field. Pending the development of an appropriate measurement procedure for measurements performed below 30 MHz, when performing measurements at a closer distance than specified, the results shall be extrapolated to the specified distance by either making measurements at a minimum of two distances on at least one radial to determine the proper extrapolation factor or by using the square of an inverse linear distance extrapolation factor (40 dB/decade).

(3) The applicant for a grant of certification shall specify the interpolation or extrapolation method used in the application filed with the Commission. For equipment subject to notification or verification, this information shall be retained with the measurement data.

(4) When measurement distances of 30 meters or less are specified in the regulations, the Commission will test the equipment at the distance specified unless measurement at that distance results in measurements being performed in the near field. When measurement distances of greater than 30 meters are specified in the regulations, the Commission will test the equipment at a closer distance, usually 30 meters, extrapolating the measured field strength to the specified distance using the methods shown in this
Section.

(5) Measurements shall be performed at a sufficient number of radials around the equipment under test to determine the radial at which the field strength values of the radiated emissions are maximized. The maximum field strength at the frequency being measured shall be reported in an application for certification.

(g) Equipment under test shall be adjusted, using those controls that are readily accessible to or are intended to be accessible to the consumer, in such a manner as to maximize the level of the emissions. For those devices to which wire leads may be attached by the consumer, tests shall be performed with wire leads attached. The wire leads shall be of the length to be used with the equipment if that length is known. Otherwise, wire leads one meter in length shall be attached to the equipment. Longer wire leads may be employed if necessary to interconnect to associated peripherals.

(h) For a composite system that incorporates devices contained either in a single enclosure or in separate enclosures connected by wire or cable, testing for compliance with the standards in this Part shall be performed with all of the devices in the system functioning. If an intentional radiator incorporates more than one antenna or other radiating source and these radiating sources are designed to emit at the same time, measurements of conducted and radiated emissions shall be performed with all radiating sources that are to be employed emitting.

(i) If the device under test provides for the connection of external accessories, including external electrical input signals, the device shall be tested with the accessories attached. The device under test shall be fully exercised with these external accessories. The emission tests shall be performed with the device and accessories configured in a manner that tends to produce maximized emissions within the range of variations that can be expected under normal operating conditions. In the case of multiple accessory external ports, an external accessory shall be connected to one of each type of port. Only one test using peripherals or external accessories that are representative of the devices that will be employed with the equipment under test is required. All possible equipment combinations do not need to be tested. The accessories or peripherals connected to the device being tested shall be unmodified, commercially available equipment.

(j) If the equipment under test consists of a central control unit and an external or internal accessory(ies) (peripheral) and the party verifying the equipment or applying for a grant of equipment authorization manufactures or assembles the central control unit and at least one of the accessory devices that can be used with that control unit, testing of the control unit and/or the accessory(ies) must be performed using the devices manufactured or assembled by that party, in addition to any other needed devices which the party does not manufacture or assemble. If the party verifying the equipment or applying for a grant of equipment authorization does not manufacture or assemble the central control unit and at least one of the accessory devices that can be used with that control unit or the party can demonstrate that the central control unit or accessory(ies) normally would be marketed or

used with equipment from a different entity, testing of the central control unit and/or the accessory(ies) must be performed using the specific combination of equipment which is intended to be marketed or used together. Only one test using peripherals or accessories that are representative of the devices that will be employed with the equipment under test is required. All possible equipment combinations are not required to be tested. The accessories or peripherals connected to the device being tested shall be unmodified, commercially available equipment.

(k) A composite system is a system that incorporates different devices contained either in a single enclosure or in separate enclosures connected by wire or cable. If the individual devices in a composite system are subject to different technical standards, each such device must comply with its specific standards. In no event may the measured emissions of the composite system exceed the highest level permitted for an individual component. For digital devices which consist of a combination of Class A and Class B devices, the total combination of which results in a Class A digital device, it is only necessary to demonstrate that the equipment combination complies with the limits for a Class A device. This equipment combination may not be employed for obtaining a grant of equipment authorization or verifying a Class B digital device. However, if the digital device combination consists of a Class B central control unit, e.g., a personal computer, and a Class A internal peripheral(s), it must be demonstrated that the Class B central control unit continues to comply with the limits for a Class B digital device with the Class A internal peripheral(s) installed but not active.

(l) Measurements of radio frequency emissions conducted to the public utility power lines shall be performed using a 50 ohm/50 uH line-impedance stabilization network (LISN). Note: Receivers tested under the transition provisions contained in Section 15.37 may be tested with a 50 ohm/5 uH LISN.

(m) Measurements on intentional radiators or receivers, other than TV broadcast receivers, shall be performed and, if required, reported for each band in which the device can be operated with the device operating at the number of frequencies in each band specified in the following table:

Frequency range over which device operates	Number of frequencies	Location in the range of operation
1 MHz or less	1	Middle
1 to 10 MHz	2	1 near top and 1 near bottom
More than 10 MHz	3	1 near top, 1 near middle and 1 near bottom

(n) Measurements on TV broadcast receivers shall be performed with the receiver tuned to each VHF frequency and also shall include the following oscillator frequencies: 520, 550, 600, 650, 700, 750, 800, 850, 900 and 931 MHz. If measurements cannot be made on one or more of the latter UHF frequencies because of the presence of signals from licensed radio stations or for other reasons to be detailed in the measurement report, measurements shall be made with the receiver oscillator at a nearby frequency. If the receiver is not capable of receiving channels above 806 MHz, the measurements employing the oscillator frequencies 900 and 931 MHz may be omitted.

(o) The amplitude of spurious emissions from intentional radiators and emissions from unintentional radiators which are attenuated more than 20 dB below the permissible value need not be reported unless specifically required elsewhere in this Part.

Section 15.33 ***Frequency range of radiated measurements.***

(a) For an intentional radiator, the spectrum shall be investigated from the lowest radio frequency signal generated in the device, without going below 9 kHz, up to at least the tenth harmonic of the highest fundamental frequency or to 40 GHz, whichever is lower. If the intentional radiator contains a digital device, regardless of whether this digital device controls the functions of the intentional radiator or the digital device is used for additional control or function purposes other than to enable the operation of the intentional radiator, the frequency range shall be investigated up to the higher of the tenth harmonic of the highest fundamental frequency designed to be emitted by the intentional radiator or the upper frequency of the measurement range applicable to the digital device, as shown in paragraph (b)(1) of this Section.

(b) For unintentional radiators:

(1) Except as otherwise indicated in paragraphs (b)(2) or (b)(3), for an unintentional radiator, including a digital device, the spectrum shall be investigated from the lowest radio frequency signal generated or used in the device, without going below the lowest frequency for which a radiated emission limit is specified, up to the frequency shown in the following table:

Highest frequency generated or used in the device or on which the device operates or tunes (MHz)	Upper frequency of measurement range (MHz)
Below 1.705	30
1.705 - 108	1000
108 - 500	2000
500 - 1000	5000
Above 1000	5th harmonic of the highest frequency or 40 GHz, whichever is lower

(2) A unintentional radiator, excluding a digital device, in which the highest frequency generated in the device, the highest frequency used in the device and the highest frequency on which the device operates or tunes are less than 30 MHz and which, in accordance with Section 15.109, is required to comply with standards on the level of radiated emissions within the frequency range 9 kHz to 30 MHz, such as a CB receiver or a device designed to conduct its radio frequency emissions via connecting wires or cables, e.g., a carrier current system not intended to radiate, shall be investigated from the lowest radio frequency generated or used in the device, without going below 9 kHz (25 MHz for CB receivers), up to the frequency shown in the following table. If the unintentional radiator contains a digital device, the upper frequency to be investigated shall be that shown in the table below or in the table in paragraph (b)(1) above, as based on both the highest frequency generated and the highest frequecy used in the digital device, whichever range is higher.

Highest frequency generated or used in the device or on which the device operates or tunes (MHz)	Upper frequency of measurement range (MHz)
Below 1.705	30
1.705 - 10	400
10 - 30	500

(3) Except for a CB receiver, a receiver employing superheterodyne techniques shall be investigated from 30 MHz up to at least the second harmonic of the highest local oscillator frequency generated in the device. If such receiver is controlled by a digital device, the frequency range shall be investigated up to the higher of the second harmonic of the highest local oscillator frequency generated in the device or the upper frequency of the measurement range specified for the digital device in paragraph (b)(1) of this Section.

(c) The above specified frequency ranges of measurements apply to the measurement of radiated emissions and, in the case of receivers, the measurement to demonstrate compliance with the antenna conduction limits specified in Section 15.111. The frequency range of measurements for AC power line conducted limits is specified in Sections 15.107 and 15.207 and applies to all equipment subject to those regulations. In some cases, depending on the frequency(ies) generated and used by the equipment, only signals conducted onto the AC power lines are required to be measured.

(d) Particular attention should be paid to harmonics and subharmonics of the fundamental frequency as well as to those frequencies removed from the fundamental by multiples of the oscillator frequency. Radiation at the frequencies of multiplier stages should also be checked.

Section 15.35 ***Emission limits.***

The conducted and radiated emission limits shown in this Part are based on the following, unless otherwise specified elsewhere in this Part:

(a) On any frequency or frequencies below or equal to 1000 MHz, the limits shown are based on measuring equipment employing a CISPR quasi-peak detector function and related measurement bandwidths, unless otherwise specified. The specifications for the measuring instrument using the CISPR quasi-peak detector can be found in Publication 16 of the International Special Committee on Radio Interference (CISPR) of the International Electrotechnical Commission. As an alternative to CISPR quasi-peak measurements, the responsible party, at its option, may demonstrate compliance with the emission limits using measuring equipment employing a peak detector function, properly adjusted for such factors as pulse desensitization, as long as the same bandwidths as indicated for CISPR quasi-peak measurements are employed.

Note: For pulse modulated devices with a pulse-repetition frequency of 20 Hz or less and for which CISPR quasi-peak measurements are specified, compliance with the regulations shall be demonstrated using measuring equipment employing a peak detector function, properly adjusted for such factors as pulse desensitization, using the same measurement bandwidths that are indicated for CISPR quasi-peak measurements.

(b) On any frequency or frequencies above 1000 MHz, the radiated limits shown are based on the use of measurement instrumentation employing an average detector function. When average radiated emission measurements are specified in the regulations, including emission measurements below 1000 MHz, there is also a limit on the radio frequency emissions, as measured using instrumentation with a peak detector function, corresponding to 20 dB above the maximum permitted average limit for the frequency being investigated. Measurements of AC power line conducted emissions are performed using a CISPR quasi-peak detector, even for devices for which average radiated emission measurements are specified.

(c) When the radiated emission limits are expressed in terms of the average value of the emission, and pulsed operation is employed, the measured field strength shall be determined by averaging over one complete pulse train, including blanking intervals, as long as the pulse train does not exceed 0.1 seconds. As an alternative (provided the transmitter operates for longer than 0.1 seconds) or in those cases where the pulse train exceeds 0.1 seconds, the measured field strength shall be determined from the average absolute voltage during a 0.1 second interval during which the field strength is at its maximum value. The exact method of calculating the average field strength shall be submitted with any application for certification or shall be retained in the measurement data file for equipment subject to notification or verification.

Section 15.37 ***Transition provisions for compliance with the rules.***

Equipment may be authorized, manufactured and imported under the rules in effect prior to (insert date 60 days after date of publication in the Federal Register) in accordance with the following schedules:

(a) *For all intentional and unintentional radiators, except for receivers:* Radio frequency equipment verified by the responsible party or for which an application for a grant of equipment authorization is submitted to the Commission on or after (insert date 3 years after effective date of the R&O) shall comply with the regulations specified in this Part. Radio frequency equipment that is manufactured or imported on or after (insert date 5 years after effective date of the R&O) shall comply with the regulations specified in this Part.

(b) *For receivers:* Except as shown in paragraph (b)(2), receivers subject to the regulations in this Part that are manufactured or imported on or after (insert date 10 years after effective date of the R&O) shall comply with the regulations specified in this Part. However, if a receiver is associated with a transmitter that could not have been authorized under the regulations in effect prior to (insert date 60 days after date of publication in the Federal Register), e.g., a transmitter operating under the provisions of Sections 15.209 or 15.249 (below 960 MHz), the transition provisions in this Section do not apply. Such receivers must comply with the regulations in this Part.

(c) There are no restrictions on the operation or marketing of equipment complying with the regulations in effect prior to (insert date 60 days after date of publication in the Federal Register).

Subpart B - Unintentional Radiators

Section 15.101 ***Equipment authorization of unintentional radiators.***

(a) Except as otherwise exempted in Sections 15.23, 15.103, and 15.113, unintentional radiators shall be authorized by the Commission or verified prior to the initiation of marketing, as follows:

Type of Device	Equipment Authorization Required *
TV broadcast receiver	Verification
FM broadcast receiver	Verification
CB receiver	Certification
Superregenerative receiver	Certification
Scanning receiver	Certification
All other receivers subject to Part 15	Notification
TV interface device	Certification
Cable system terminal device	Notification
Stand-alone cable input selector switch	Verification
Class B personal computers & peripherals	Certification
Other Class B digital devices & peripherals	Verification
Class A digital devices & peripherals	Verification
External switching power supplies	Verification
All other devices	Verification

* *See* additional provisions in this Section and in Section 15.103 of this Part.

(b) Only those receivers that operate (tune) within the frequency range of 30-960 MHz and CB receivers are subject to the authorizations shown in paragraph (a). However, receivers indicated as being subject to notification that are contained within a transceiver, the transmitter portion of which is subject to type acceptance, certification or notification, shall be authorized under the verification procedure. Receivers operating above 960 MHz or below 30 MHz, except for CB receivers, are exempt from complying with the technical provisions of this Part but are subject to Section 15.5.

(c) Personal computer mother boards (the circuit board performing the central processing) that are marketed assembled with an enclosure and a power supply must be certificated with that enclosure and power supply.

(d) Peripheral devices, as defined in Section 15.3(r), shall be certified or verified, as appropriate, prior to marketing. However, if a peripheral always will be marketed with a specific personal computer, it is not necessary to obtain a separate grant of certification for that peripheral, provided the specific combination of personal computer and peripheral has received a grant of certification.

(e) Subassemblies to digital devices are not subject to the technical standards in this Part unless they are marketed as part of a system in which case the resulting system must comply with the applicable regulations. Subassemblies include: those devices that are enclosed solely within the enclosure housing the digital device and are not included in the definition of peripherals in Section 15.3(r), such as internal disc drives and memory expansion units; digital devices marketed to another manufacturer to be incorporated into a final product; circuit boards containing the central processing unit that are marketed without an enclosure or power supply; and, switching power supplies that are separately marketed and are solely for use internal to a digital device.

(f) The procedures for obtaining a grant of certification or notification and for verification are contained in Subpart J of Part 2 of this Chapter.

Section 15.103 ***Exempted devices.***

The following devices are subject only to the general conditions of operation in Sections 15.5 and 15.29 and are exempt from the specific technical standards and other requirements contained in this Part. The operator of the exempted device shall be required to stop operating the device upon a finding by the Commission or its representative that the device is causing harmful interference. Operation shall not resume until the condition causing the harmful interference has been corrected. Although not mandatory, it is strongly recommended that the manufacturer of an exempted device endeavor to have the device meet the specific technical standards in this Part.

(a) A digital device utilized exclusively in any transportation vehicle including motor vehicles and aircraft.

(b) A digital device used exclusively as an electronic control or power system utilized by a public utility or in an industrial plant. The term public utility includes equipment only to the extent that it is in a dedicated building or large room owned or leased by the utility and does not extend to equipment installed in a subscriber's facility.

(c) A digital device used exclusively as industrial, commercial, or medical test equipment.

(d) A digital device utilized exclusively in an appliance, e.g., microwave oven, dishwasher, clothes dryer, air conditioner (central or window), etc.

(e) Specialized medical digital devices (generally used at the direction of or under the supervision of a licensed health care practitioner) whether used in a patient's home or a health care facility. Non-specialized medical devices, i.e., devices marketed through retail channels for use by the general public, are not exempted. This exemption also does not apply to digital devices used for record keeping or any purpose not directly connected with medical treatment.

(f) Digital devices that have a power consumption not exceeding 6 nW.

(g) Joystick controllers or similar devices, such as a mouse, used with digital devices but which contain only non-digital circuitry or a simple circuit to convert the signal to the format required (e.g., an integrated circuit for analog to digital conversion) are viewed as passive add-on devices, not themselves directly subject to the technical standards or the equipment authorization requirements.

(h) Digital devices in which both the highest frequency generated and the highest frequency used are less than 1.705 MHz and which do not operate from the AC power lines or contain provisions for operation while connected to the AC power lines. Digital devices that include, or make provision for the use of, battery eliminators, AC adaptors or battery chargers which permit operation while charging or that connect to the AC power lines indirectly, obtaining their power through another device which is connected to the AC power lines, do not fall under this exemption.

(i) Responsible parties should note that equipment containing more than one device is not exempt from the technical standards in this Part unless all of the devices in the equipment meet the criteria for exemption. If only one of the included devices qualifies for exemption, the remainder of the equipment must comply with any applicable regulations. If a device performs more than one function and all of those functions do not meet the criteria for exemption, the device does not qualify for inclusion under the exemptions.

Section 15.105 ***Information to the user.***

(a) For a Class A digital device or peripheral, the instructions furnished the user shall include the following or similar statement, placed in a prominent location in the text of the manual:

> NOTE: This equipment has been tested and found to comply with the limits for a Class A digital device, pursuant to Part 15 of the FCC Rules. These limits are designed to provide reasonable protection against harmful interference when the equipment is operated in a commercial environment. This equipment generates, uses, and can radiate radio frequency energy and, if not installed and used in accordance with the instruction manual, may cause harmful interference to radio communications. Operation of this equipment in a residential area is likely to cause harmful interference in which case the user will be required to correct the interference at his own expense.

(b) For a Class B digital device or peripheral, the instructions furnished the user shall include the following or similar statement, placed in a prominent location in the text of the manual:

> NOTE: This equipment has been tested and found to comply with the limits for a Class B digital device, pursuant to Part 15 of the FCC Rules. These limits are designed to provide reasonable protection against harmful interference in a residential installation. This equipment generates, uses and can radiate radio frequency energy and, if not installed and used in accordance with the instructions, may cause harmful interference to radio communications. However, there is no guarantee that interference will not occur in a particular installation. If this equipment does cause harmful interference to radio or television reception, which can be determined by turning the equipment off and on, the user is encouraged to try to correct the interference by one or more of the following measures:
>
> -- Reorient or relocate the receiving antenna.
>
> -- Increase the separation between the equipment and receiver.
>
> -- Connect the equipment into an outlet on a circuit different from that to which the receiver is connected.
>
> -- Consult the dealer or an experienced radio/TV technician for help.

(c) The provisions of paragraphs (a) and (b) do not apply to digital devices exempted from the technical standards under the provisions of Section 15.103.

(d) For systems incorporating several digital devices, the statement shown in paragraph (a) or (b) needs to be contained only in the instruction manual for the main control unit.

Section 15.107 ***Conducted limits.***

(a) Except for Class A digital devices, for equipment that is designed to be connected to the public utility (AC) power line, the radio frequency voltage that is conducted back onto the AC power line on any frequency or frequencies within the band 450 kHz to 30 MHz shall not exceed 250 microvolts. Compliance with this provision shall be based on the measurement of the radio frequency voltage between each power line and ground at the power terminals.

(b) For a Class A digital device that is designed to be connected to the public utility (AC) power line, the radio frequency voltage that is conducted back onto the AC power line on any frequency or frequencies within the band 450 kHz to 30 MHz shall not exceed the limits in the following table. Compliance with this provision shall be based on the measurement of the radio frequency voltage between each power line and ground at the power terminals. The lower limit applies at the band edges.

Frequency of Emission (MHz)	Conducted Limit (microvolts)
0.45 - 1.705	1000
1.705- 30.0	3000

(c) For carrier current systems used as unintentional radiators whose emissions are contained within the frequency range 450 kHz to 30 MHz, the provisions of this Section shall not apply. Such systems are subject to radiated emission limits as provided in Section 15.109(e).

(d) Measurements to demonstrate compliance with the conducted limits are not required for devices which only employ battery power for operation and which do not operate from the AC power lines or contain provisions for operation while connected to the AC power lines. Devices that include, or make provision for, the use of battery chargers which permit operating while charging, AC adaptors or battery eliminators or that connect to the AC power lines indirectly, obtaining their power through another device which is connected to the AC power lines, shall be tested to demonstrate compliance with the conducted limits.

Section 15.109 ***Radiated emission limits.***

(a) Except for Class A digital devices, the field strength of radiated emissions from unintentional radiators at a distance of 3 meters shall not exceed the following values:

Frequency of Emission (MHz)	Field Strength (microvolts/meter)
30 - 88	100
88 - 216	150
216 - 960	200
Above 960	500

(b) The field strength of radiated emissions from a Class A digital device, as determined at a distance of 10 meters, shall not exceed the following:

Frequency of Emission (MHz)	Field Strength (microvolts/meter)
30 - 88	90
88 - 216	150
216 - 960	210
Above 960	300

(c) In the emission tables above, the tighter limit applies at the band edges. Sections 15.33 and 15.35 which specify the frequency range over which radiated emissions are to be measured and the detector functions and other measurement standards apply.

(d) For CB receivers, the field strength of radiated emissions within the frequency range of 25 - 30 MHz shall not exceed 40 microvolts/meter at a distance of 3 meters. The field strength of radiated emissions above 30 MHz from such devices shall comply with the limits in paragraph (a).

(e) Carrier current systems used as unintentional radiators or other unintentional radiators that are designed to conduct their radio frequency emissions via connecting wires or cables and that operate in the frequency range of 9 kHz to 30 MHz, including devices that deliver the radio frequency energy to transducers, such as ultrasonic devices not covered under Part 18 of this Chapter, shall comply with the radiated emission limits for intentional radiators provided in Section 15.209 for the frequency range of 9 kHz to 30 MHz. At frequencies above 30 MHz, the provisions of paragraph (a) of this Section apply.

(f) For a receiver which employs terminals for the connection of an external receiving antenna, the receiver shall be tested to demonstrate compliance with the provisions of this Section with an antenna connected to the antenna terminals unless the antenna conducted power is measured as specified in Section 15.111(a). If a permanently attached receiving antenna is used, the receiver shall be tested to demonstrate compliance with the provisions of this Section.

Section 15.111 ***Antenna power conduction limits for receivers.***

(a) In addition to the radiated emission limits, receivers that operate (tune) in the frequency range 30 to 960 MHz and CB receivers that provide terminals for the connection of an external receiving antenna may be tested to demonstrate compliance with the provisions of Section 15.109 with the antenna terminals shielded and terminated with a resistive termination equal to the impedance specified for the antenna, provided these receivers also comply with the following: with the receiver antenna terminal connected to a resistive termination equal to the impedance specified or employed for the antenna, the power at the antenna terminal at any frequency within the range of measurements specified in Section 15.33 shall not exceed 2.0 nanowatts.

(b) CB receivers and receivers that operate (tune) in the frequency range 30 to 960 MHz that are provided only with a permanently attached antenna shall comply with the radiated emission limitations in this Part, as measured with the antenna attached.

Section 15.113 ***Power line carrier systems.***

Power line carrier systems, as defined in Section 15.3(t), are subject only to the following requirements:

(a) A power utility operating a power line carrier system shall submit the details of all existing systems plus any proposed new systems or changes to existing systems to an industry-operated entity as set forth in Section 90.63(g) of this Chapter. No notification to the FCC is required.

(b) The operating parameters of a power line carrier system (particularly the frequency) shall be selected to achieve the highest practical degree of compatibility with authorized or licensed users of the radio spectrum. The signals from this operation shall be contained within the frequency band 9 kHz to 490 kHz. A power line carrier system shall operate on an unprotected, non-interference basis in accordance with Section 15.5 of this Part. If harmful interference occurs, the electric power utility shall discontinue use or adjust its power line carrier operation, as required, to remedy the interference. Particular attention should be paid to the possibility of interference to Loran C operations at 100 kHz.

(c) Power line carrier system apparatus shall be operated with the minimum power possible to accomplish the desired purpose. No equipment authorization is required.

(d) The best engineering principles shall be used in the generation of radio frequency currents by power line carrier systems to guard against harmful interference to authorized radio users, particularly on the fundamental and harmonic frequencies.

(e) Power line carrier system apparatus shall conform to such engineering standards as may be promulgated by the Commission. In addition, such systems should adhere to industry approved standards designed to enhance the use of power line carrier systems.

(f) These provisions for power line carrier systems apply only to systems operated by a power utility for general supervision of the power system and do not permit operation on electric lines which connect the distribution substation to the customer or house wiring.

Section 15.115 ***TV interface devices, including cable system terminal devices.***

(a) Measurements of the radiated emissions of a TV interface device shall be conducted with the output terminal(s) of the device terminated by a resistance equal to the rated output impedance. The emanations of a TV interface device incorporating an intentional radiator shall not exceed the limits in Section 15.109 or Subpart C of this Part, whichever is higher for each frequency. Where it is possible to determine which portion of the device is contributing a particular radio frequency emission, the emissions from the TV interface device portion shall comply with the emission limits in Section 15.109, and the emissions from the intentional radiator shall comply with Subpart C of this Part.

(b) Output signal limits:

(1) At any RF output terminal, the maximum measured RMS voltage, in microvolts, corresponding to the peak envelope power of the modulated signal during maximum amplitude peaks across a resistance (R in ohms) matching the rated output impedance of the TV interface device, shall not exceed the following:

(i) For a cable system terminal device or a TV interface device used with a master antenna, 692.8 times the square root of (R) for the video signal and 155 times the square root of (R) for the audio signal.

(ii) For all other TV interface devices, 346.4 times the square root of (R) for the video signal and 77.5 times the square root of (R) for the audio signal.

(2) At any RF output terminal, the maximum measured RMS voltage, in microvolts, corresponding to the peak envelope power of the modulated signal during maximum amplitude peaks across a resistance (R in ohms) matching the rated output impedance of the TV interface device, of any emission appearing on frequencies removed by more than 4.6 MHz below or 7.4 MHz above the video carrier frequency on which the TV interface device is operated shall not exceed the following:

(i) For a cable system terminal device or a TV interface device used with a master antenna, 692.8 times the square root of (R).

(ii) For all other TV interface devices, 10.95 times the square root of (R).

(3) The term "master antenna" used in this paragraph refers to TV interface devices employed for central distribution within large buildings such as apartments, hospitals, office buildings, etc.

(c) A TV interface device shall be equipped with a transfer switch for connecting the antenna terminals of a receiver selectively either to the receiving antenna or to the radio frequency output of the TV interface device, subject to the following:

(1) When measured in any of its set positions, transfer switches shall comply with the following requirements:

(i) For a cable system terminal device or a TV interface device equipped for use with a cable system or a master antenna, as defined in paragraph (b)(3), the isolation between the antenna and cable input terminals shall be at least 80 dB from 54 to 216 MHz and at least 60 dB from 216 to 550 MHz. The 80 dB limit applies at 216 MHz. In the case of a transfer switch requiring a power source, the required isolation shall be maintained in the event the device is not connected to a power source or power is interrupted.

(ii) For all other TV interface devices, the maximum voltage, corresponding to the peak envelope power of the modulated video signal during maximum amplitude peaks, in microvolts, appearing at the receiving antenna input terminals when terminated with a resistance (R in ohms) matching the rated impedance of the antenna input of the switch, shall not exceed 0.346 times the square root of (R).

(iii) Measurement to determine compliance with the transfer switch limits shall be made using a connecting cable, where required, between the TV interface device and the transfer switch of the type and length 1) provided with the TV interface device, 2) recommended in the instruction manual, or 3) normally employed by the consumer.

(2) A TV interface device shall be designed and constructed, to the extent practicable, so as to preclude the possibility that the consumer may inadvertently attach the output of the device to the receiving antenna, if any, without first going through the transfer switch.

(3) A transfer switch is not required for a TV interface device that, when connected, results in the user no longer having any need to receive standard over-the-air broadcast signals via a separate antenna. A transfer switch is not required to be marketed with a cable system terminal device unless that device provides for the connection of an external antenna. A transfer switch is not required for a device that is intended to be used as an accessory to an authorized TV interface device.

(4) An actual transfer switch is not required for a TV interface device, including a cable system terminal device, that has an antenna input terminal(s); provided, the circuitry following the antenna input terminal(s) has sufficient bandwidth to allow the reception of all TV broadcast channels authorized under Part 73 of this Chapter and: for a cable system terminal device that can alternate between the reception of cable television service and an antenna, compliance with the isolation requirement specified in paragraph (c)(1)(i) can be demonstrated; and, for all other TV interface devices, the maximum voltage appearing at the antenna terminal(s) does not exceed the limit in paragraph (c)(1)(ii).

(5) If a transfer switch is not required, the following label shall be used in addition to the label shown in Section 15.19(a):

This device is intended to be attached to a receiver that is not used to receive over-the-air broadcast signals. Connection of this device in any other fashion may cause harmful interference to radio communications and is in violation of the FCC Rules, Part 15.

(d) A TV interface device, including a cable system terminal device, shall incorporate circuitry to automatically prevent emanations from the device from exceeding the technical specifications in this Part. These circuits shall be adequate to accomplish their functions when the TV interface device is presented, if applicable, with video input signal levels in the range of one to five volts; this requirement is not applicable to a TV interface device that uses a built-in signal source and has no provisions for the connection of an external signal source. For devices that contain provisions for an external signal source but do not contain provisions for the input of an external baseband signal, e.g., some cable system terminal devices, compliance with the provisions of this paragraph shall be demonstrated with a radio frequency input signal of 0 to 25 dBmV.

(e) For cable system terminal devices and TV interface devices used with a master antenna, as defined in paragraph (b)(3), the holder of the grant of authorization shall specify in the instruction manual or pamphlet, if a manual is not provided, the types of wires or coaxial cables necessary to ensure that the unit complies with the requirements of this Part. The holder of the grant of authorization must comply with the provisions of Section 15.27. For all other TV interface devices, the wires or coaxial cables used to couple the output signals to the TV receiver shall be provided by the responsible party.

(f) A TV interface device which is submitted to the Commission as a composite device in a single enclosure containing a RF modulator, video source and other component devices shall be submitted on a single application (FCC Form 731) and shall be authorized as a single device.

(g) An external device or accessory that is intended to be attached to a TV interface device shall comply with the technical and administrative requirements set out in the rules under which it operates. For example, a personal computer must be certificated to show compliance with the regulations for digital devices.

Section 15.117 *TV broadcast receivers.*

(a) All TV broadcast receivers shipped in interstate commerce or imported from any foreign country into the United States for sale or resale to the public, shall comply with the provisions of this Section. The reference in this Section to TV broadcast receivers also includes devices, such as TV interface devices, that incorporate the tuner portion of a TV broadcast receiver and that are equipped with an antenna or antenna terminals that can be used for the off-the-air reception of TV broadcast signals, as authorized under Part 73 of this Chapter.

(b) TV broadcast receivers shall be capable of adequately receiving all channels allocated by the Commission to the television broadcast service.

(c) On a given receiver, use of the UHF and VHF tuning systems shall provide approximately the same degree of tuning accuracy with approximately the same expenditure of time and effort: *Provided, however,* that this requirement will be considered to be met if the need for routine fine tuning is eliminated on UHF channels.

(1) *Basic tuning mechanism.* If a TV broadcast receiver is equipped to provide for repeated access to VHF television channels at discrete tuning positions, that receiver shall be equipped to provide for repeated access to a minimum of six UHF television channels at discrete tuning positions. Unless a discrete tuning position is provided for each channel allocated to UHF television, each position shall be readily adjustable to a particular UHF channel by the user without the use of tools. If 12 or fewer discrete tuning positions are provided, each position shall be adjustable to receive any channel allocated to UHF television.

Note: The combination of detented rotary switch and pushbutton controls is acceptable, provided UHF channels, after their initial selection, can be accurately tuned with an expenditure of time and effort approximately the same as that used in accurately tuning VHF channels. A UHF tuning system comprising five pushbuttons and a separate manual tuning knob is considered to provide repeated access to six channels at discrete tuning positions. A one-knob (VHF/UHF) tuning system providing repeated access to 11 or more discrete tuning positions is also acceptable, provided each of the tuning positions is readily adjustable, without the use of tools, to receive any UHF channel.

(2) *Tuning controls and channel readout.* UHF tuning controls and channel readout on a given receiver shall be comparable in size, location, accessibility and legibility to VHF controls and readout on that receiver.

Note: Differences between UHF and VHF channel readout that follow directly from the larger number of UHF television channels available are acceptable if it is clear that a good faith effort to comply with the provisions of this Section has been made.

(d) If equipment and controls that tend to simplify, expedite or perfect the reception of television signals (e. g., AFC, visual aids, remote control, or signal seeking capability referred to generally as tuning aids) are incorporated into the VHF portion of a TV broadcast receiver, tuning aids of the same type and comparable capability and quality shall be provided for the UHF portion of that receiver.

(e) If a television receiver has an antenna affixed to the VHF antenna terminals, it must have an antenna designed for and capable of receiving all UHF television channels affixed to the UHF antenna terminals. If a VHF antenna is provided with but not affixed to a receiver, a UHF antenna shall be provided with the receiver.

(f) The picture sensitivity of a TV broadcast receiver averaged for all channels between 14 and 69 inclusive shall not be more than 8 dB larger than the peak picture sensitivity of that receiver averaged for all channels between 2 and 13 inclusive.

(g) The noise figure for any television channel 14 to 69 inclusive shall not exceed 14 dB. A TV receiver model is considered to comply with this noise figure if the maximum noise figure for channels 14-69 inclusive of 97.5% of all receivers within that model does not exceed 14 dB.

(1) The responsible party shall measure the noise figure of a number of UHF channels of the test sample to give reasonable assurance that the UHF noise figure for each channel complies with the above limit.

(2) The responsible party shall insert in his files a statement explaining the basis on which it will rely to ensure that at least 97.5% of all production units of the test sample that are manufactured have a noise figure of no greater than 14 dB.

(3) Within one year after a specific TV receiver model has been verified for compliance, the responsible party shall file a report with the Commission giving the actual UHF noise figure performance of units of that model actually measured during that year. The report, as an alternative, may be filed by the party responsible for the marketing of that model TV broadcast receiver within this country.

(4) In the case of a TV tuner built-in as part of a video tape recorder that uses a power splitter between the antenna terminals of the video tape recorder and the input terminals of the TV tuner or a TV broadcast receiver that uses a power splitter between the antenna terminals of two or more UHF tuners contained within that receiver, 4 dB may be subtracted from the noise figure measured at the antenna terminals of the video tape recorder or TV broadcast receiver for determining compliance of the UHF tuner(s) with the 14 dB noise figure limit.

(h) For a TV broadcast receiver equipped with a cable input selector switch, the selector switch shall provide in any of its set positions isolation between the antenna and cable input terminals of at least 80 dB from 54 to 216 MHz, and of at least 60 dB from 216 to 550 MHz. At 216 MHz, the 80 dB isolation standard applies. In the case of a selector switch requiring a power source, the required isolation shall be maintained in the event the device is not connected to a power source or power is interrupted.

A physical cable input selector switch is not required for a TV broadcast receiver that can alternate between the reception of cable television service and an antenna, provided compliance with the isolation requirement specified in this paragraph can be demonstrated and the circuitry following the antenna input terminal(s) has sufficient bandwidth to allow the reception of all TV broadcast channels authorized under this Chapter.

Subpart C - Intentional Radiators

Section 15.201 ***Equipment authorization requirement.***

(a) Intentional radiators operated as carrier current systems and devices operated under the provisions of Sections 15.211, 15.213 and 15.221 shall be verified pursuant to the procedures in Subpart J of Part 2 of this Chapter prior to marketing.

(b) Except as otherwise exempted in paragraph (c) of this Section and in Section 15.23 of this Part, all intentional radiators operating under the provisions of this Part shall be certificated by the Commission pursuant to the procedures in Subpart J of Part 2 of this Chapter prior to marketing.

(c) For devices such as perimeter protection systems which, in accordance with Section 15.31(d), are required to be measured at the installation site, each application for certification must be accompanied by a statement indicating that the system has been tested at three installations and found to comply at each installation. Until such time as certification is granted, a given installation of a system that was measured for the submission for certification will be considered to be in compliance with the provisions of this Chapter, including the marketing regulations in Subpart I of Part 2, if tests at that installation show the system to be in compliance with the relevant technical requirements. Similarly, where measurements must be performed on site for equipment subject to verification, a given installation that has been verified to demonstrate compliance with the applicable standards will be considered to be in compliance with the provisions of this Chapter, including the marketing regulations in Subpart I of Part 2.

(d) For perimeter protection systems operating in the frequency bands allocated to television broadcast stations operating under Part 73 of this Chapter, the holder of the grant of certification must test *each* installation prior to initiation of normal operation to verify compliance with the technical standards and must maintain a list of all installations and records of measurements. For perimeter protection systems operating outside of the frequency bands allocated to television broadcast stations, upon receipt of a grant of certification, further testing of the same or similar type of system or installation is not required.

Section 15.203 ***Antenna requirement.***

An intentional radiator shall be designed to ensure that no antenna other than that furnished by the responsible party shall be used with the device. The use of a permanently attached antenna or of an antenna that uses a unique coupling to the intentional radiator shall be considered sufficient to comply with the provisions of this Section. The manufacturer may design the unit so that a broken antenna can be replaced by the user, but the use of a standard antenna jack or electrical connector is prohibited. This requirement does not apply to carrier current devices or to devices operated under the provisions of Sections 15.211, 15.213, 15.217, 15.219, 15.221, or 15.247. Further, this requirement does not apply to intentional radiators that must be professionally installed, such as perimeter protection systems and some field disturbance sensors, or to other intentional radiators which, in accordance with Section 15.31(d), must be measured at the installation site. However, the installer shall be responsible for ensuring that the proper antenna is employed so that the limits in this Part are not exceeded.

Section 15.205 ***Restricted bands of operation.***

(a) Except as shown in paragraph (d), only spurious emissions are permitted in any of the frequency bands listed below:

MHz	MHz	MHz	GHz
0.090 - 0.110	162.0125 - 167.17	2310 - 2390	9.3 - 9.5
0.49 - 0.51	167.72 - 173.2	2483.5 - 2500	10.6 - 12.7
2.1735 - 2.1905	240 - 285	2655 - 2900	13.25 - 13.4
8.362 - 8.366	322 - 335.4	3260 - 3267	14.47 - 14.5
13.36 - 13.41	399.9 - 410	3332 - 3339	15.35 - 16.2
25.5 - 25.67	608 - 614	3345.8 - 3358	17.7 - 21.4
37.5 - 38.25	960 - 1240	3600 - 4400	22.01 - 23.12
73 - 75.4	1300 - 1427	4500 - 5250	23.6 - 24.0
108 - 121.94	1435 - 1626.5	5350 - 5460	31.2 - 31.8
123 - 138	1660 - 1710	7250 - 7750	36.43 - 36.5
149.9 - 150.05	1718.8 - 1722.2	8025 - 8500	Above 38.6
156.7 - 156.9	2200 - 2300	9000 - 9200	

(b) Except as provided in paragraph (d), the field strength of emissions appearing within these frequency bands shall not exceed the limits shown in Section 15.209. At frequencies equal to or less than 1000 MHz, compliance with the limits in Section 15.209 shall be demonstrated using measurement instrumentation employing a CISPR quasi-peak detector. Above 1000 MHz, compliance with the emission limits in Section 15.209 shall be demonstrated based on the average value of the measured emissions. The provisions in Section 15.35 apply to these measurements.

(c) Except as provided in paragraph (d), regardless of the field strength limits specified elsewhere in this Subpart, the provisions of this Section apply to emissions from any intentional radiator.

(d) The following devices are exempt from the requirements of this Section:

(1) Swept frequency field disturbance sensors operating between 1.705 and 37 MHz provided their emissions only sweep through the bands listed in paragraph (a), the sweep is never stopped with the fundamental emission within the bands listed in paragraph (a), and the fundamental emission is outside of the bands listed in paragraph (a) more than 99% of the time the device is actively transmitting, without compensation for duty cycle.

(2) Transmitters used to detect buried electronic markers at 101.4 kHz which are employed by telephone companies.

(3) Cable locating equipment operated pursuant to Section 15.213.

Section 15.207 ***Conducted limits.***

(a) For an intentional radiator which is designed to be connected to the public utility (AC) power line, the radio frequency voltage that is conducted back onto the AC power line on any frequency or frequencies within the band 450 kHz to 30 MHz shall not exceed 250 microvolts. Compliance with this provision shall be based on the measurement of the radio frequency voltage between each power line and ground at the power terminals.

(b) The limit in paragraph (a) shall not apply to intentional radiators operated as carrier current systems in the frequency range of 450 kHz to 30 MHz. Such systems are subject to radiated emission limits as provided in Sections 15.205 and 15.209.

(c) Measurements to demonstrate compliance with the conducted limits are not required for devices which only employ battery power for operation and which do not operate from the AC power lines or contain provisions for operation while connected to the AC power lines. Devices that include, or make provision for, the use of battery chargers which permit operating while charging, AC adaptors or battery eliminators or that connect to the AC power lines indirectly, obtaining their power through another device which is connected to the AC power lines, shall be tested to demonstrate compliance with the conducted limits.

Section 15.209 ***Radiated emission limits, general requirements.***

(a) Except as provided elsewhere in this Subpart, the emissions from an intentional radiator shall not exceed the field strength levels specified in the following table:

Frequency (MHz)	Field Strength (microvolts/meter)	Measurement Distance (meters)
0.009 - 0.490	2400/F(kHz)	300
0.490 - 1.705	24000/F(kHz)	30
1.705 - 30.0	30	30
30 - 88	100 **	3
88 - 216	150 **	3
216 - 960	200 **	3
Above 960	500	3

** Except as provided in paragraph (g), fundamental emissions from intentional radiators operating under this Section shall not be located in the frequency bands 54-72 MHz, 76-88 MHz, 174-216 MHz or 470-806 MHz.

(b) In the emission table above, the tighter limit applies at the band edges.

(c) The level of any unwanted emissions from an intentional radiator operating under these general provisions shall not exceed the level of the fundamental emission. For intentional radiators which operate under the provisions of other Sections within this Part and which are required to reduce their unwanted emissions to the limits specified in this table, the limits in this table are based on the frequency of the unwanted emission and not the fundamental frequency. However, the level of any unwanted emissions shall not exceed the level of the fundamental frequency.

(d) The emission limits shown in the above table are based on measurements employing a CISPR quasi-peak detector except for the frequency bands 9-90 kHz, 110-490 kHz and above 1000 MHz. Radiated emission limits in these three bands are based on measurements employing an average detector.

(e) The provisions in Sections 15.31, 15.33, and 15.35 for measuring emissions at distances other than the distances specified in the above table, determining the frequency range over which radiated emissions are to be measured, and limiting peak emissions apply to all devices operated under this Part.

(f) In accordance with Section 15.33(a), in some cases the emissions from an intentional radiator must be measured to beyond the tenth harmonic of the highest fundamental frequency designed to be emitted by the intentional radiator because of the incorporation of a digital device. If measurements above the tenth harmonic are so required, the radiated emissions above the tenth harmonic shall comply with the general radiated emission limits applicable to the incorporated digital device, as shown in Section 15.109 and as based on the frequency of the emission being measured, or, except for emissions contained in the restricted frequency bands shown in Section 15.205, the limit on spurious emissions specified for the intentional radiator, whichever is the higher limit. Emissions which must be measured above the tenth harmonic of the highest fundamental frequency designed to be emitted by the intentional radiator and which fall within the restricted bands shall comply with the general radiated emission limits in Section 15.109 that are applicable to the incorporated digital device.

(g) Perimeter protection systems operating under the provisions of this Section in the frequency bands allocated to TV broadcast stations, as shown in Part 73 of this Chapter, shall contain their fundamental emissions within the frequency bands 54-72 MHz and 76-88 MHz. Further, the use of such perimeter protection systems is limited to industrial, business and commercial applications.

Section 15.211 ***Tunnel radio systems.***

An intentional radiator utilized as part of a tunnel radio system may operate on any frequency provided it meets all of the following conditions:

(a) Operation of a tunnel radio system (intentional radiator and all connecting wires) shall be contained solely within a tunnel, mine or other structure that provides attenuation to the radiated signal due to the presence of naturally surrounding earth and/or water.

(b) Any intentional or unintentional radiator external to the tunnel, mine or other structure, as described in paragraph (a), shall be subject to the other applicable regulations contained within this Part.

(c) The total electromagnetic field from a tunnel radio system on any frequency or frequencies appearing outside of the tunnel, mine or other structure described in paragraph (a) shall not exceed the limits shown in Section 15.209 when measured at the specified distance from the surrounding structure, including openings. Particular attention shall be paid to the emissions from any opening in the structure to the outside environment. When measurements are made from the openings, the distances shown in Section 15.209 refer to the distance from the plane of reference which fits the entire perimeter of each above ground opening.

(d) The conducted limits in Section 15.207 apply to the radio frequency voltage on the public utility power lines outside of the tunnel.

Section 15.213 ***Cable locating equipment.***

An intentional radiator used as cable locating equipment, as defined in Section 15.3(d), may be operated on any frequency within the band 9 - 490 kHz, subject to the following limits: within the frequency band 9 kHz, up to, but not including, 45 kHz, the peak output power from the cable locating equipment shall not exceed 10 watts; and, within the frequency band 45 kHz to 490 kHz, the peak output power from the cable locating equipment shall not exceed one watt. If provisions are made for connection of the cable locating equipment to the AC power lines, the conducted limits in Section 15.207 also apply to this equipment.

Radiated Emission Limits, Additional Provisions

Section 15.215 ***Additional provisions to the general radiated emission limitations.***

(a) The regulations in Sections 15.217-15.251 provide alternatives to the general radiated emission limits for intentional radiators operating in specified frequency bands. Unless otherwise stated, there are no restrictions as to the types of operation permitted under these sections.

(b) In most cases, unwanted emissions outside of the frequency bands shown in these alternative provisions must be attenuated to the emission limits shown in Section 15.209. In no case shall the level of the unwanted emissions from an intentional radiator operating under these additional provisions exceed the field strength of the fundamental emission.

(c) For those bands of frequencies where alternative radiated emission limitations apply and for which a frequency stability is not specified, it is recommended that the fundamental frequency be kept within at least the central 80% of the permitted band in order to minimize the possibility of out-of-band operation.

(d) Where the following sections specify limits on the bandwidth of the emissions, the bandwidth limits include the effects of frequency sweeping, frequency hopping, and other modulation techniques which may be employed.

Section 15.217 ***Operation in the band 160 - 190 kHz.***

(a) The total input power to the final radio frequency stage (exclusive of filament or heater power) shall not exceed one watt.

(b) The total length of the transmission line, antenna, and ground lead (if used) shall not exceed 15 meters.

(c) All emissions below 160 kHz or above 190 kHz shall be attenuated at least 20 dB below the level of the unmodulated carrier. Determination of compliance with the 20 dB attenuation specification may be based on measurements at the intentional radiator's antenna output terminal unless the intentional radiator uses a permanently attached antenna, in which case compliance shall be demonstrated by measuring the radiated emissions.

Section 15.219 ***Operation in the band 510 - 1705 kHz.***

(a) The total input power to the final radio frequency stage (exclusive of filament or heater power) shall not exceed 100 milliwatts.

(b) The total length of the transmission line, antenna and ground lead (if used) shall not exceed 3 meters.

(c) All emissions below 510 kHz or above 1705 kHz shall be attenuated at least 20 dB below the level of the unmodulated carrier. Determination of compliance with the 20 dB attenuation specification may be based on measurements at the intentional radiator's antenna output terminal unless the intentional radiator uses a permanently attached antenna, in which case compliance shall be demonstrated by measuring the radiated emissions.

Section 15.221 ***Operation in the band 525 - 1705 kHz.***

(a) The provisions of this Section are restricted to the operation of an AM broadcast station on a college or university campus or on the campus of any other educational institution. Operation is restricted to the grounds of the campus. For the band 535-1705 kHz, the frequency of operation shall be chosen such that operation is not within the protected field strength contours of licensed AM stations.

(b) On the campus, the field strength of emissions appearing outside of this frequency band shall not exceed the general radiated emission limits shown in Section 15.209 as measured from the radiating source. There is no limit on the field strength of emissions appearing within this frequency band, except that the provisions of Section 15.5 continue to apply.

(c) At the perimeter of the campus, the field strength of any emissions, including those within the frequency band 525 - 1705 kHz, shall not exceed the general radiated emission limits in Section 15.209.

(d) The conducted limits specified in Section 15.207 apply to the radio frequency voltage on the public utility power lines outside of the campus. Due to the large number of radio frequency devices which may be used on the campus, contributing to the conducted emissions, as an alternative to measuring conducted emissions on the AC power lines outside of the campus. it is acceptable to demonstrate compliance with this provision by measuring each individual intentional radiator employed in the system at the point where it connects to the AC power lines. As provided in Section 15.207(b), if only a carrier current system is employed, the AC power line conducted limits do not apply. However, the radiated emission limits provided in this Section apply to carrier current systems.

(e) A grant of equipment authorization is not required for a campus radio system. In lieu thereof, a campus radio system shall be verified for compliance with the regulations in accordance with Subpart J of Part 2 of this Chapter. This data shall be kept on file at the location of the studio, office or control room associated with the transmitting equipment. In some cases, this may correspond to the location of the transmitting equipment.

Section 15.223 ***Operation in the band 1. 705 - 10 MHz.***

(a) The field strength of any emission within the band 1.705-10.0 MHz shall not exceed 100 microvolts/meter at a distance of 30 meters. However, if the bandwidth of the emission is less than 10% of the center frequency, the field strength shall not exceed 15 microvolts/meter or (the bandwidth of the device in kHz) divided by (the center frequency of the device in MHz) microvolts/meter at a distance of 30 meters, whichever is the higher level. For the purposes of this Section, bandwidth is determined at the points 6 dB down from the modulated carrier. The emission limits in this paragraph are based on measure-

ment instrumentation employing an average detector. The provisions in Section 15.35(b) for limiting peak emissions apply.

(b) The field strength of emissions outside of the band 1.705-10.0 MHz shall not exceed the general radiated emission limits in Section 15.209.

Section 15.225 ***Operation within the band 13. 553 - 13. 567 MHz.***

(a) The field strength of any emissions within this band shall not exceed 10,000 microvolts/meter at 30 meters.

(b) The field strength of any emissions appearing outside of this band shall not exceed the general radiated emission limits shown in Section 15.209.

(c) The frequency tolerance of the carrier signal shall be maintained within ±0.01% of the operating frequency over a temperature variation of -20 degrees to +50 degrees C at normal supply voltage, and for a variation in the primary supply voltage from 85% to 115% of the rated supply voltage at a temperature of 20 degrees C. For battery operated equipment, the equipment tests shall be performed using a new battery.

Section 15.227 ***Operation within the band 26. 96 - 27. 28 MHz.***

(a) The field strength of any emission within this band shall not exceed 10,000 microvolts/meter at 3 meters. The emission limit in this paragraph is based on measurement instrumentation employing an average detector. The provisions in Section 15.35 for limiting peak emissions apply.

(b) The field strength of any emissions which appear outside of this band shall not exceed the general radiated emission limits in Section 15.209.

Section 15.229 ***Operation within the band 40. 66 - 40. 70 MHz.***

(a) Unless operating pursuant to the provisions in Section 15.231, the field strength of any emissions within this band shall not exceed 1000 microvolts/meter at 3 meters.

(b) The field strength of any emissions appearing outside of this band shall not exceed the general radiated emission limits in Section 15.209.

(c) The frequency tolerance of the carrier signal shall be maintained within ±0.01% of the operating frequency over a temperature variation of -20 degrees to + 50 degrees C at normal supply voltage, and for a variation in the primary supply voltage from 85% to 115% of the rated supply voltage at a temperature of 20 degrees C. For battery operated equipment, the equipment tests shall be performed using a new battery.

Section 15.231 ***Periodic operation in the band 40. 66 - 40. 70 MHz and above 70 MHz.***

(a) The provisions of this Section are restricted to periodic operation within the band 40.66 - 40.70 MHz and above 70 MHz. Except as shown in paragraph (e) of this Section, the intentional radiator is restricted to the transmission of a control signal such as those used with alarm systems, door openers, remote switches, etc. Radio control of toys is not permitted. Continuous transmissions, such as voice or video, and data transmissions are not permitted. The prohibition against data transmissions does not preclude the use of recognition codes. Those codes are used to identify the sensor that is activated or to identify the particular component as being part of the system. The following conditions shall be met to comply with the provisions for this periodic operation:

(1) A manually operated transmitter shall employ a switch that will automatically deactivate the transmitter within not more than 5 seconds of being released.

(2) A transmitter activated automatically shall cease transmission within 5 seconds after activation.

(3) Periodic transmissions at regular predetermined intervals are not permitted. However, polling or supervision transmissions to determine system integrity of transmitters used in security or safety applications are allowed if the periodic rate of transmission does not exceed one transmission of not more than one second duration per hour for each transmitter.

(4) Intentional radiators which are employed for radio control purposes during emergencies involving fire, security, and safety of life, when activated to signal an alarm, may operate during the pendency of the alarm condition.

(b) In addition to the provisions of Section 15.205, the field strength of emissions from intentional radiators operated under this Section shall not exceed the following:

Fundamental Frequency (MHz)	Field Strength of Fundamental (microvolts/meter)	Field Strength of Spurious Emissions (microvolts/meter)
40.66 - 40.70	2,250	225
70 - 130	1,250	125
130 - 174	1,250 to 3,750 **	125 to 375 **
174 - 260	3,750	375
260 - 470	3,750 to 12,500 **	375 to 1,250 **
Above 470	12,500	1,250

** linear interpolations

(1) The above field strength limits are specified at a distance of 3 meters. The tighter limits apply at the band edges.

(2) Intentional radiators operating under the provisions of this Section shall demonstrate compliance with the limits on the field strength of emissions, as shown in the above table, based on the average value of the measured emissions. As an alternative, compliance with the limits in the above table may be based on the use of measurement instrumentation with a CISPR quasi-peak detector. The specific method of measurement employed shall be specified in the application for equipment authorization. If average emission measurements are employed, the provisions in Section 15.35 for averaging pulsed emissions and for limiting peak emissions apply. Further, compliance with the provisions of Section 15.205 shall be demonstrated using measurement instrumentation with a CISPR quasi-peak detector.

(3) The limits on the field strength of the spurious emissions in the above table are based on the fundamental frequency of the intentional radiator. Spurious emissions shall be attenuated to the average limits shown in this table or to the general limits shown in Section 15.209, as measured with a CISPR quasi-peak detector, whichever limit permits a higher field strength.

(c) The bandwidth of the emission shall be no wider than 0.25% of the center frequency for devices operating above 70 MHz and below 900 MHz. For devices operating above 900 MHz, the emission shall be no wider than 0.5% of the center frequency. Bandwidth is determined at the points 20 dB down from the modulated carrier.

(d) For devices operating within the frequency band 40.66 - 40.70 MHz, the bandwidth of the emission shall be confined within the band edges and the frequency tolerance of the carrier shall be ±0.01%. This frequency tolerance shall be maintained for a temperature variation of -20 degrees to +50 degrees C at normal supply voltage, and for a variation in the primary supply voltage from 85% to 115% of the rated supply voltage at a temperature of 20 degrees C. For battery operated equipment, the equipment tests shall be performed using a new battery.

(e) Intentional radiators may operate at a periodic rate exceeding that specified in paragraph (a) and may be employed for any type of operation, including operation prohibited in paragraph (a), provided the intentional radiator complies with the provisions of paragraphs (b) through (d) of this Section, except the field strength table in paragraph (b) is replaced by the following:

Fundamental Frequency (MHz)	Field Strength of Fundamental (microvolts/meter)	Field Strength of Spurious Emissions (microvolts/meter)
40.66 - 40.70	1,000	100
70 - 130	500	50
130 - 174	500 to 1,500 **	50 to 150 **
174 - 260	1,500	150
260 - 470	1,500 to 5,000 **	150 to 500 **
Above 470	5,000	500

** linear interpolations

In addition, devices operated under the provisions of this paragraph shall be provided with a means for automatically limiting operation so that the duration of each transmission shall not be greater than one second and the silent period between transmissions shall be at least 30 times the duration of the transmission but in no case less than 10 seconds.

Section 15.233 ***Operationwithin the bands 46. 60 - 46. 98 MHz and 49. 66 - 50. 0 MHz.***

(a) The provisions shown in this Section are restricted to cordless telephones.

(b) An intentional radiator used as part of a cordless telephone system shall operate on one or more of the following frequency pairs:

Channel	Base Transmitter (MHz)	Handset Transmitter (MHz)
1	46.610	49.670
2	46.630	49.845
3	46.670	49.860
4	46.710	49.770
5	46.730	49.875
6	46.770	49.830
7	46.830	49.890
8	46.870	49.930
9	46.930	49.990
10	46.970	49.970

(c) The field strength of the fundamental emission shall not exceed 10,000 microvolts/meter at 3 meters. The emission limit in this paragraph is based on measurement instrumentation employing an average detector. The provisions in Section 15.35 for limiting peak emissions apply.

(d) The fundamental emission shall be confined within a 20 kHz band centered on the actual carrier frequency. Modulation products outside of this 20 kHz band shall be attenuated at least 26 dB below the level of the unmodulated carrier or to the general limits in Section 15.209, whichever permits the higher emission levels. Emissions on any frequency more than 20 kHz removed from the center frequency shall consist solely of unwanted emissions and shall not exceed the general radiated emission limits in Section 15.209.

(e) All emissions exceeding 20 microvolts/meter at 3 meters are to be reported in the application for certification. Tests to determine compliance with this requirement shall be performed using an appropriate input signal as prescribed in Section 2.989 of this Chapter.

(f) If the device provides for the connection of external accessories, including external electrical input signals, the device must be tested with the accessories attached. The emission tests shall be performed with the device and accessories configured in a manner which tends to produce the maximum level of emissions within the range of variations that can be expected under normal operating conditions.

(g) The frequency tolerance of the carrier signal shall be maintained within ±0.01% of the operating frequency. The tolerance shall be maintained for a temperature variation of -20 degrees C to +50 degrees C at normal supply voltage, and for variation in the primary voltage from 85% to 115% of the rated supply voltage at a temperature of 20 degrees C. For battery operated equipment, the equipment tests shall be performed using a new battery.

(h) For equipment authorization, a single application form, FCC Form 731, may be filed for a cordless telephone system, provided the application clearly identifies and provides data for all parts of the system to show compliance with the applicable technical requirements. When a single application form is submitted, both the base station and the portable handset must carry the same FCC identifier. The application shall include a fee for certification of each type of transmitter and notification or certification, if appropriate, for each type of receiver included in the system.

(i) A cordless telephone which is intended to be connected to the public telephone network shall also comply with the applicable regulations in Part 68 of this Chapter. A separate application for registration under Part 68 is required.

(j) The label required under Subpart A shall also contain the following statement: "Privacy of communications may not be ensured when using this phone".

(k) The box or other package in which the individual cordless telephone is to be marketed shall carry a statement in a prominent location, visible to the buyer before purchase, which reads as follows:

> NOTICE: The base units of some cordless telephones may respond to other nearby units or to radio noise resulting in telephone calls being dialed through this unit without your knowledge and possibly calls being misbilled. In order to protect against such occurrences, this cordless telephone is provided with the following features: (to be completed by the responsible party).

An application for certification of a cordless telephone shall specify the complete text of the statement that will be carried on the package and indicate where, specifically, it will be located on the carton.

Section 15.235 ***Operation within the band 49. 82 - 49. 90 MHz.***

(a) The field strength of any emission within this band shall not exceed 10,000 microvolts/meter at 3 meters. The emission limit in this paragraph is based on measurement instrumentation employing an average detector. The provisions in Section 15.35 for limiting peak emissions apply.

(b) The field strength of any emissions appearing between the band edges and up to 10 kHz above and below the band edges shall be attenuated at least 26 dB below the level of the unmodulated carrier or to the general limits in Section 15.209, whichever permits the higher emission levels. The field strength of any emissions removed by more than 10 kHz from the band edges shall not exceed the general radiated emission limits in Section 15.209. All signals exceeding 20 microvolts/meter at 3 meters shall be reported in the application for certification.

(c) For a home-built intentional radiator, as defined in Section 15.23(a), operating within the band 49.82-49.90 MHz, the following standards may be employed:

(1) The RF carrier and modulation products shall be maintained within the band 49.82-49.90 MHz.

(2) The total input power to the device measured at the battery or the power line terminals shall not exceed 100 milliwatts under any condition of modulation.

(3) The antenna shall be a single element, one meter or less in length, permanently mounted on the enclosure containing the device.

(4) Emissions outside of this band shall be attenuated at least 20 dB below the level of the unmodulated carrier.

(5) The regulations contained in Section 15.23 of this Part apply to intentional radiators constructed under the provisions of this paragraph.

(d) Cordless telephones are not permitted to operate under the provisions of this Section.

Section 15.237 ***Operation in the bands 72. 0 - 73. 0 MHz and 75. 4 - 76. 0 MHz.***

(a) The intentional radiator shall be restricted to use as an auditory assistance device.

(b) Emissions from the intentional radiator shall be confined within a band 200 kHz wide centered on the operating frequency. The 200 kHz band shall lie wholly within the above specified frequency ranges.

(c) The field strength of any emissions within the permitted 200 kHz band shall not exceed 80 millivolts/meter at 3 meters. The field strength of any emissions radiated on any frequency outside of the specified 200 kHz band shall not exceed 1500 microvolts/meter at 3 meters. The emission limits in this paragraph are based on measurement instrumentation employing an average detector. The provisions in Section 15.35 for limiting peak emissions apply.

Section 15.239 ***Operation in the band 88 - 108 MHz.***

(a) Emissions from the intentional radiator shall be confined within a band 200 kHz wide centered on the operating frequency. The 200 kHz band shall lie wholly within the frequency range of 88-108 MHz.

(b) The field strength of any emissions within the permitted 200 kHz band shall not exceed 250 microvolts/meter at 3 meters. The emission limit in this paragraph is based on measurement instrumentation employing an average detector. The provisions in Section 15.35 for limiting peak emissions apply.

(c) The field strength of any emissions radiated on any frequency outside of the specified 200 kHz band shall not exceed the general radiated emission limits in Section 15.209.

(d) A custom built telemetry intentional radiator operating in the frequency band of 88-208 MHz and used for experimentation by an educational institute need not be certified provided the device complies with the standards in this Part and the educational institution notifies the Engineer in Charge of the local FCC office, in writing, in advance of operation, providing the following information:

(1) The dates and places where the device will be operated;

(2) The purpose for which the device will be used;

(3) A description of the device, including the operating frequency, RF power output, and antenna; and,

(4) A statement that the device complies with the technical provisions of this Part.

Section 15.241 ***Operation in the band 174 - 216 MHz.***

(a) Operation under the provisions of this Section is restricted to biomedical telemetry devices.

(b) Emissions from the device shall be confined within a 200 kHz band which shall lie wholly within the frequency range of 174-216 MHz.

(c) The field strength of any emissions radiated within the specified 200 kHz band shall not exceed 1500 microvolts/meter at 3 meters. The field strength of emissions radiated on any frequency outside of the specified 200 kHz band shall not exceed 150 microvolts/meter at 3 meters. The emission limits in this paragraph are based on measurement instrumentation employing an average detector. The provisions in Section 15.35 for limiting peak emissions apply.

Section 15.243 ***Operation in the band 890 - 940 MHz.***

(a) Operation under the provisions of this Section is restricted to devices that use radio frequency energy to measure the characteristics of a material. Devices operated pursuant to the provisions of this Section shall not be used for voice communications or the transmission of any other type of message.

(b) The field strength of any emissions radiated within the specified frequency band shall not exceed 500 microvolts/meter at 30 meters. The emission limit in this paragraph is based on measurement instrumentation employing an average detector. The provisions in Section 15.35 for limiting peak emissions apply.

(c) The field strength of emissions radiated on any frequency outside of the specified band shall not exceed the general radiated emission limits in Section 15.209.

(d) The device shall be self-contained with no external or readily accessible controls which may be adjusted to permit operation in a manner inconsistent with the provisions in this Section. Any antenna that may be used with the device shall be permanently attached thereto and shall not be readily modifiable by the user.

Section 15.245 ***Operation within the bands 902 - 928 MHz, 2435 - 2465 MHz, 5785 - 5815 MHz, 10500 - 10550 MHz, and 24075 - 24175 MHz.***

(a) Operation under the provisions of this Section is limited to intentional radiators used as field disturbance sensors, excluding perimeter protection systems.

(b) The field strength of emissions from intentional radiators operated within these frequency bands shall comply with the following:

Fundamental Frequency (MHz)	Field of Fundamental (millivolts/meter)	Strength Field Strength of Harmonics (millivolts/meter)
902 - 928	500	1.6
2435 - 2465	500	1.6
5785 - 5815	500	1.6
10500 - 10550	2500	25.0
24075 - 24175	2500	25.0

(1) Field strength limits are specified at a distance of 3 meters.

(2) Emissions radiated outside of the specified frequency bands, except for harmonics, shall be attenuated by at least 50 dB below the level of the fundamental or to the general radiated emission limits in Section 15.209, whichever is the lesser attenuation.

(3) The emission limits shown in the above table are based on measurement instrumentation employing an average detector. The provisions in Section 15.35 for limiting peak emissions apply.

Section 15.247 ***Operation within the bands 902 - 928 MHz, 2400 - 2483. 5 MHz, and 5725 - 5850 MHz.***

(a) Operation under the provisions of this Section is limited to frequency hopping and direct sequence spread spectrum intentional radiators that comply with the following provisions:

(1) For frequency hopping systems, at least 75 hopping frequencies, separated by at least 25 kHz, shall be used. The average time of occupancy on any frequency shall not be greater than 0.4 seconds within a 30 second period. The maximum bandwidth of the hopping channel is 25 kHz.

(2) For direct sequence systems, the minimum 6 dB bandwidth shall be at least 500 kHz.

(b) The maximum peak output power of the intentional radiator shall not exceed one watt.

(c) Radio frequency output power outside these frequency bands over any 100 kHz bandwidth shall be at least 20 dB below that in any 100 kHz bandwidth within the band that contains the highest level of the desired power.

Note: Spread spectrum systems are sharing these bands on a noninterference basis with systems supporting critical Government requirements that have been allocated the usage of these bands, secondary only to ISM equipment operated under the provisions of Part 18 of this Chapter. Many of these Government systems are airborne radiolocation systems that emit a high EIRP which can cause interference to other users. Also, investigations of the effect of spread spectrum interference to U. S. Government operations in the 902-928 MHz band may require a future decrease in the power limits allowed for spread spectrum operation.

Section 15.249 ***Operation within the bands 902 - 928 MHz, 2400 - 2483. 5 MHz, 5725 - 5875 MHz, and 24. 0 - 24. 25 GHz.***

(a) The field strength of emissions from intentional radiators operated within these frequency bands shall comply with the following:

Fundamental Frequency	Field Strength of Fundamental (millivolts/meter)	Field Strength of Harmonics (microvolts/meter)
902 - 928 MHz	50	500
2400 - 2483.5 MHz	50	500
5725 - 5875 MHz	50	500
24.0 - 24.25 GHz	250	2500

(b) Field strength limits are specified at a distance of 3 meters.

(c) Emissions radiated outside of the specified frequency bands, except for harmonics, shall be attenuated by at least 50 dB below the level of the fundamental or to the general radiated emission limits in Section 15.209, whichever is the lesser attenuation.

(d) As shown in Section 15.35(b), for frequencies above 1000 MHz, the above field strength limits are based on average limits. However, the peak field strength of any emission shall not exceed the maximum permitted average limits specified above by more than 20 dB under any condition of modulation.

Section 15.251 ***Operation within the bands 2. 9 - 3. 26 GHz, 3. 267 - 3. 332 GHz, 3. 339 - 3. 3458 GHz, and 3. 358 - 3. 6 GHz.***

(a) Operation under the provisions of this Section is limited to automatic vehicle identification systems (AVIS) which use swept frequency techniques for the purpose of automatically identifying transportation vehicles.

(b) The field strength anywhere within the frequency range swept by the signal shall not exceed 3000 microvolts/meter/MHz at 3 meters in any direction. Further, an AVIS, when in its operating position, shall not produce a field strength greater than 400 microvolts/meter/MHz at 3 meters in any direction within ± 10 degrees of the horizontal plane. In addition to the provisions of Section 15.205, the field strength of radiated emissions outside the frequency range swept by the signal shall be limited to a maximum of 100 microvolts/meter/MHz at 3 meters, measured from 30 MHz to 20 GHz for the complete system. The emission limits in this paragraph are based on measurement instrumentation employing an average detector. The provisions in Section 15.35 for limiting peak emissions apply.

(c) The minimum sweep repetition rate of the signal shall not be lower than 4000 sweeps per second, and the maximum sweep repetition rate of the signal shall not exceed 50,000 sweeps per second.

(d) An AVIS shall employ a horn antenna or other comparable directional antenna for signal emission.

(e) Provision shall be made so that signal emission from the VIS shall occur only when the vehicle to be identified is within the radiated field of the system.

(f) In addition to the labelling requirements in Section 15.19(a), the label attached to the AVIS transmitter shall contain a third statement regarding operational conditions, as follows:

. . . and, (3) during use this device (the antenna) may not be pointed within ± ** degrees of the horizontal plane.

The double asterisks in condition three (**) shall be replaced by the responsible party with the angular pointing restriction necessary to meet the horizontal emission limit specified in paragraph (b).

(g) In addition to the information required in Subpart J of Part 2, the application for certification shall contain:

(1) Measurements of field strength per MHz along with the intermediate frequency of the spectrum analyzer or equivalent measuring receiver;

(2) The angular separation between the direction at which maximum field strength occurs and the direction at which the field strength is reduced to 400 microvolts/meter/MHz at 3 meters;

(3) A photograph of the spectrum analyzer display showing the entire swept frequency signal and a calibrated scale for the vertical and horizontal axes; the spectrum analyzer settings that were used shall be labelled on the photograph; and,

(4) The results of the frequency search for spurious and sideband emissions from 30 MHz to 20 GHz, exclusive of the swept frequency band, with the measuring instrument as close as possible to the unit under test.

APPENDIX C

Restricted Bands of Operation under Part 15

Frequency (MHz)	Allocation/Use Requiring Restricted Designation
0.09-0.11	Loran C radionavigation
0.49-0.51	Maritime distress frequency
2.1735-2.1905	Mobile distress frequency
8.362-8.366	Maritime and aeronautical survival craft search and rescue
13.36-13.41	Radio astronomy
25.5-25.67	Radio astronomy
37.5-38.25	Radio astronomy
73.0-75.4	73-74.6 MHz: Radio astronomy 74.6-75.4 MHz: Aeronautical radionavigation marker beacon (75.0 MHz) and guard bands
108-121.94	108-117.975 MHz: Aeronautical radionavigation (aircraft-to-tower) 117.975-121.9375 MHz: Aeronautical mobile for safety and regularity of flight 121.4-121.6 MHz: Search and rescue (SARSAT)
123-138	123-123.2: Coordinated search and rescue by mobile, land and aeronautical 123.2-123.8: Aeronautical flight test voice communications 123.5875-137 MHz: Aeronautical mobile for safety and regularity of flight 137-138 MHz: Satellite down link
149.9-150.05	Radionavigation satellite down link
156.7-156.9	Search and rescue (maritime mobile distress and calling on 156.7625-156.8375 MHz)

Frequency (MHz)	Allocation/Use Requiring Restricted Designation
162.0125-167.17 167.72-173.3	Wind shear detection around airports and to warn pilots when emergency action is needed, protection of national and visiting foreign dignitaries, and tracking of endangered and dangerous wildlife requiring receiver sensitivities on the order of -145 dBm
240-285	243 MHz: Search and rescue (SARSAT) Other: U. S. Government satellite down links, military satellites, glide slope indicators, instrument landing systems
322-335.4	322-328.6 MHz: Radio astronomy 328.6-335.4 MHz: Aeronautical radionavigation - instrument landing system glide path
399.9-410	399.9-400.05 MHz: Radionavigation satellite 400.05-400.15 MHz: Standard frequency and time signal 400.15-402 MHz: Satellite down link 402-406 MHz: Meteorological aids (radiosonde) 406-406.1 MHz: Emergency position-indicating radiobeacon (EPIRB) 406.1-410 MHz: Radio astronomy
608-614	Radio astronomy
960-1240	960-1215 MHz: Aeronautical radionavigation 1215-1240 MHz: Satellite down link
1300-1427	1300-1350 MHz: Aeronautical radionavigation 1350-1400 MHz: Spectral line observations of neutral hydrogen 1400-1427 MHz: Radio astronomy
1435-1626.5	1435-1530 MHz: aeronautical flight test telemetry 1530-1559 MHz: Satellite down link 1559-1610 MHz: Satellite down link and aeronautical radionavigation 1610-1626.5 MHz: Aeronautical radionavigation 1610.6-1613.8 MHz: Spectral line observations of OH radical (radio astronomy)
1660-1710	1660-1668.4 MHz: Radio astronomy 1668.4-1670 MHz: Radio astronomy and radiosonde 1670-1710 MHz: Satellite down link and radiosonde

Frequency (MHz)	Allocation/Use Requiring Restricted Designation
1718.8-1722.2	Radio astronomy
2200-2300	Satellite down link
2310-2390	Aeronautical flight test telemetry
2483.5-2500	Radiodetermination satellite down link (Geostar)
2655-2900	2655-2690 MHz: Radio astronomy and satellite down link 2690-2700 MHz: Radio astronomy 2700-2900 MHz: Air traffic control radars
3260-3267	Spectral line observations (radio astronomy)
3332-3339	Spectral line observations (radio astronomy)
3345.8-3358	Spectral line observations (radio astronomy)
3600-4400	3600-4200 MHz: Satellite down link 4200-4400 MHz: Aeronautical radionavigation
4500-5250	4500-4800 MHz: Satellite down link 4800-5000 MHz: Radio astronomy 5000-5250 MHz: Aeronautical radionavigation
5350-5460	Aeronautical radionavigation
7250-7750	Satellite down link
8025-8500	Satellite down link
9000-9200	Aeronautical radionavigation
9300-9500	Radar transponders for maritime search and rescue; airborne weather and ground mapping radar for airborne radionavigation, particularly under poor visibility conditions
10600-12700	10.6-10.7 GHz: Radio astronomy 10.7-12.2 GHz: Satellite down link 12.2-12.7 GHz: Direct broadcast satellite
13250-13400	Aeronautical radionavigation

Frequency (GHz)	Allocation/Use Requiring Restricted Designation
14.47-14.5	Spectral line observations (radio astronomy)
15.35-16.2	15.35-15.4 GHz: Radio astronomy 15.4-15.7 GHz: Shuttle landing system; airborne weather and ground mapping radar for radionavigation 15.7-16.2 GHz: Airport surface detection equipment used to locate and navigate aircraft while on the ground
17.7-21.4	Satellite down link
22.01-23.12	22.01-22.5 GHz: Radio astronomy 22.5-23.0 GHz: Broadcast satellite (22.81-22.86 GHz is also radio astronomy) 23.0-23.07 GHz: Fixed/inter-satellite/mobile (used to fill in the gap between frequency bands) 23.07-23.12 GHz: Radio astronomy
23.6-24.0	Radio astronomy
31.2-31.8	Radio astronomy
36.43-36.5	Radio astronomy
38.6-40.0	Satellite down link
Above 40.0	Numerous bands above 40 GHz would be restricted because of their allocation for radio astronomy, satellite down links, etc. In addition, the rules limit the range of measurements to 40 GHz. Because measurements are not required above 40 GHz, standards have not been established at higher frequencies. Further, there appears to be no current demand for non-licensed operation above 40 GHz. Thus, operation of a Part 15 device above 40 GHz is not being permitted at this time. Specific restricted frequency bands and standards for Part 15 devices operating above 40 GHz will be addressed in a future rule making proceeding, if needed.

FOOTNOTES

[1] The limit applied to these early devices was 15 microvolts/meter (uV/m) at a distance equivalent to the wavelength of the operating frequency divided by 2 Pi. This limit is set forth in Section 15.7 of the existing rules, 47 CFR Section 15.7.

[2] *See, Notice of Proposed Rule Making*, Docket No. 87-389, 2 FCC Rcd 6135 (1987).

[3] A list of the parties filing comments and reply comments is provided in Appendix A. A number of parties filed comments after the specified filing date. These late filed comments have been accepted and included in the record in this proceeding.

[4] A number of changes to the regulations which were proposed in the *Notice* are not being addressed in this Order. We believe additional notice and comment is needed before we can appropriately resolve these issues. These issues include standards for kits of radio frequency devices, field strength limits for spread spectrum transmitters, and the definitions of Class B (residential) digital devices and personal computers. However, we have changed the definition of a peripheral to a digital device to correspond with the Public Notice released by our Office of Engineering and Technology on September 18, 1986, and the News Release issued by our Field Operations Bureau on June 3, 1987, that provided interpretations of the rules.

[5] The energy conducted back into the power line can radiate from the power line. This type of interference usually occurs in the spectrum below 30 MHz. Limits on the amount of RF energy conducted back into the power line protects services such as AM broadcasting, amateur radio and public safety. In some instances, the present rules do not specify any conducted limits because the device was expected to be used in limited quantities or it was believed that the equipment would not generate significant emissions below 30 MHz.

[6] The conducted limits for Class A (non-residential) digital devices were proposed to be 1000 uV over the frequency range 450 kHz to 1.705 MHz and 3000 uV over the frequency range 1.705 MHz to 30 MHz. These are the same limits presently in effect for Class A devices, except the frequency at which the limits are allowed to increase was changed from 1.6 MHz to 1.705 MHz. This change was proposed in anticipation of the expansion of the spectrum allocated to AM broadcasting. As proposed in the *Notice*, conducted limits shall not apply to carrier current systems whose emissions are contained within the frequency band 450 kHz to 30 MHz.

[7] The quasi-peak detector characteristics are detailed in Publication 16 of the International Special Committee on Radio Interference (CISPR).

[8] The interference distances shown were calculated by the League using an attenuation of 20 dB per doubling of distance. The League also calculated other potential interference distances using a free space attenuation of 6 dB per doubling of the distance.

[9] *See*, 47 CFR Section 90.242.

[10] *See, Report and Order*, Docket No. 86-422, 3 FCC Rcd 1702 (1988).

[11] *See*, OST Bulletin No. 63, "Understanding FCC Rules & Regulations under Part 15 for Low Power Transmitters," December 1984.

[12] An example of an operation under Part 15 where device-specific regulations were retained is auditory assistance devices for the handicapped. The permitted field strength level of the radiated emissions of the devices is high enough to cause interference to the authorized radio services. However, the low proliferation of this equipment reduces the probability that interference would be caused.

[13] GWEN is a communication system employed by the Department of Defense.

[14] The 27 MHz band is 26.99-27.26 MHz. Operation currently is permitted on six channels with the maximum bandwidth limited to 20 kHz. *See*, 47 CFR Section 15.116. The 49 MHz band is 49.82-49.90 MHz. Within this band, operation currently is permitted on five channels with the maximum bandwidth limited to 20 kHz. *See*, 47 CFR Sections 15.117-15.119.

[15] Perimeter protection systems are field disturbance sensors that use buried "leaky" cables installed so as to detect any movement within the protected area. Use is limited to industrial, business and commercial applications. *See*, 47 CFR Section 15.310.

[16] In the *Notice*, we inadvertently deleted the 40.66-40.70 MHz band as an authorized band for control and security alarm and other periodic systems. The deletion of this band was an oversight. The provisions to operate in this band are being retained in this Order.

[17] The handset of a cordless telephone transmits and the base station receives within the frequency band 49.82-49.90 MHz on channels 2, 3, 5, 6 and 7.

[18] Cable locating equipment consists of RF generating equipment that is used to couple a signal onto buried cables, pipes, lines or similar structures or elements that act as the antenna. The resulting system acts as an intentional radiator, allowing a trained operator to locate the desired structure or element with a receiver. Operation normally is conducted at low frequencies, below 490 kHz.

[19] ISM devices are regulated under Part 18 of the regulations. Operation as an ISM device entails the use of radio frequency energy to perform work instead of the conveying of information.

[20] The ISM bands allocated to the ARS are those bands at 902-928 Hz and higher frequencies.

[21] For example, Class A computers are permitted to operate at higher field strengths than Class B computers. *See* 47 CFR Sections 15.801-15.840.

[22] Examples of radio services requiring the reception of very low signal levels are satellite down links and radio astronomy.

[23] The comments from the Pacific Companies were filed in connection with the previously cited Docket No. 86-422 and incorporated by that *Report and Order* into this proceeding.

[24] *See*, NTIA's comments regarding emissions from authorized services in paragraph 57, *supra*.

[25] In some cases, the frequency bands employed by the U. S. Government are used for the purpose of national security. Thus, we recognize that the commenting parties are unable to examine the actual use of these bands or their sensitivity to interference. However, use for national security is sufficient justification for designation as a restricted band.

[26] We are not designating the aeronautical flight test voice bands in the frequency range 2.8-22 MHz as restricted bands. Neither AFTRCC nor Rockwell demonstrated that such operation were prone to receiving interference from Part 15 transmitters operating at the proposed emission limits.

[27] This is the "KTB limit" where K equals Boltzmann's constant, T is the temperature in degrees Kelvin, and B is the noise bandwidth. NTIA defined B to equal 30 kHz within the frequency range of 30 to 960 MHz and 300 kHz above 960 MHz. Using this KTB limit, NTIA then determined the field strength

limit that would cause a Part 15 device to produce, at a distance of about 300 meters, a signal level equal to the stated KTB noise value.

[28] *See,* Report 224-5, "Interference Protection Criteria for the Radioastronomy Service", International Telecommunication Union, International Radio Consultative Committee (CCIR), Recommendations and Reports of the CCIR, 1982, Volume II, XVth Plenary Assembly.

[29] These radio astronomy bands are 1400-1427 MHz, 1660.5-1668.4 MHz, 2690-2700 MHz and 4990-5000 MHz.

[30] The request to amend Part 18 of our regulations is outside the scope of this proceeding.

[31] *See, Memorandum Opinion and Order*, Docket No. 86-422, **(add cite).**

[32] The emission limits for digital devices were not proposed to be changed from the current standards.

[33] The level of emissions permitted from Part 18 devices and the applicability of those emission levels to emissions from Part 15 intentional radiators was discussed in paragraph 60 of this Order. This discussion is equally applicable to emissions appearing in the ISM bands from unintentional radiators.

[34] Genie, however, requests the Commission to delete the requirements that their superregenerative receivers be tested "cohered" and that pulse desensitization techniques be applied to measurements taken from a spectrum analyzer. Both of these arguments were considered in the proceeding in Docket No. 86-422 and were dismissed. No new evidence has been submitted by Genie to warrant reconsideration in this proceeding.

[35] Except for CB receivers and unintentional radiators which operate in the frequency range 9 kHz to 30 MHz and which are designed to conduct their emissions via connecting wires or cables, *e.g.,* carrier current systems used as unintentional radiators, the *Notice* did not propose the implementation of radiated emission limits below 30 MHz for unintentional radiators.

[36] NAB and NCTA request that the limits specified under Part 76 of our rules be employed, stating that those limits are more stringent. However, the limits in Part 76 are based on average measurements while the limits proposed in the *Notice* are based on CISPR quasi-peak measurements.

[37] For example, the Commission recently tested a number of TV broadcast receivers and found that several of these receivers already comply with the proposed limits. Also, tighter emission limits have been met for many years by receivers used in the Citizens Band Radio Service without substantial economic penalty.

[38] Radiated emission measurements below 30 MHz must still be performed for CB receivers and devices operating in the frequency range of 9 kHz to 30 MHz that are designed to conduct their radio frequency emissions via connecting wires or cables, *e.g.,* carrier current systems used as unintentional radiators. We are specifying the upper frequency range of measurements for unintentional radiators operating below 1.705 MHz to be 30 MHz as this corresponds to the upper frequency range specified for AC power line conducted emissions. Under the current regulations, for devices operating below 1.705 MHz either no upper frequency range is specified, *e.g.,* for devices designed to conduct their radio frequency emissions via connecting wires or cables, or an upper limit of 1000 MHz is specified, e.g., computing devices. Below 30 MHz, only limits on the amount of radio frequency energy conducted onto the AC power lines apply to most devices. Thus, digital devices in which the highest frequency generated or used is less than 1.705 MHz and which are not designed to permit operation while connected to the AC power lines would be exempt from the technical standards. This should result in an exemption for most, if not all, hand-held calculators, programmable "calculators," electronic games, and musical greeting cards from the regulations. Similarly, most quartz watches and clocks and modules of quartz watches and clocks would be exempt.

[39] *See,* Recommendation 478-3, "Technical Characteristics of Equipment and Principles Governing the Allocation of Frequency Channels between 25 and 1000 MHz for the Land Mobile Service", International Telecommunication Union, International Radio Consultative Committee (CCIR), Recommendations and Reports of the CCIR, 1986, Volume VIII-1, XVIth Plenary Assembly.

[40] Also, see the discussion in paragraph 60, *supra.*

[41] Quasi-peak measurement procedures have not been established above 1000 MHz.

[42] While AT&T and EIA/CEG request that the quasi-peak detector be based on ANSI Publication C63.2 instead of CISPR Publication 16, the ANSI publication has been changed to correspond more closely with CISPR Publication 16. Further, CISPR Publication 16 is the internationally recognized standard.

[43] Thus, we disagree with Genie and Linear that quasi-peak detectors will not provide uniform results, are inherently equipment sensitive and are likely to yield inaccurate measurements. We also disagree with SEIA that eliminating average measurements in the restricted bands would require manufacturers to reduce output power to comply with the quasi-peak limits. First, filtering could be employed in the transmitters to reduce emissions in the restricted bands. Second, as shown in the discussion of the limits in the restricted bands, we have increased the permitted level of spurious emissions in the restricted bands below 1000 MHz by an amount that more than compensates for the change from average to quasi-peak measurements. Further, we disagree with CBEMA that broadband emissions from digital devices should be subject to limits based on measurements with an average detector. The emission limits applied to digital devices were established based on their interference potential when the emissions were measured with a quasi-peak detector. Further, CBEMA has not provided sufficient information to demonstrate that measuring broadband emissions with an average detector would provide equivalent interference protection.

[44] Measurements employing instrumentation with a CISPR quasi-peak detector will still be required to determine the level of radio frequency emissions in the restricted bands, even if emissions from the device are otherwise measured using an average detector.

[45] If a digital device is incorporated in an intentional radiator, testing shall be required to the higher of the tenth harmonic or the frequency range applicable to the digital device, as based on the highest clock rate or data rate of the digital device. However, we are providing a slight relaxation of the emission limits for an intentional radiator if measurements above the tenth harmonic are required because of the incorporation of a digital device. In this case, emissions above the tenth harmonic must be attenuated to the general emission limits applicable to the incorporated digital device (Class A or B), as based on the frequency being measured, or, except for emissions appearing in the restricted frequency bands, to the limit on spurious emissions specified for the intentional radiator, whichever is the higher limit.

[46] Some of the manufacturers of control and security alarm devices filed comments objecting to procedures currently used to maximize the emissions from their equipment. The Commission previously addressed these matters in connection with the proceeding in Docket No. 86-422. As stated in the *Notice of Proposed Rule Making* in that proceeding, 1 FCC Rcd 1111

(1986), at para. 3, " . . . there is no new evidence or compelling reasons beyond those already addressed in the proceedings that established the regulations for control and security alarm systems to persuade us to consider . . . " the requested changes. Again, no new evidence or compelling reasons have been provided to demonstrate the need to change the existing requirements. The levels at which these emissions are currently maximized are representative of the emission levels that can be produced when the equipment is used by consumers. Therefore, we are not adopting the changes in the procedures used to maximize emissions requested by the manufacturers of control and security alarm devices.

[47] The equipment authorization procedures, as detailed in Subpart J of Part 2 of the regulations, consist of type approval, type acceptance, certification, notification, verification and registration. Except for registration, radio frequency equipment subject to these procedures must be authorized by the Commission or verified by the responsible party before marketing. Under type approval, the equipment is tested by the Commission. Type acceptance and certification require the submission to the Commission of measurement and other data. Under notification and verification, the measurement data demonstrating compliance is retained by the responsible party, unless specifically requested by the Commission. Registration applies to devices interconnected to the public telephone network and requires the submission of measurement data.

[48] *See*, 47 CFR Section 15.38.

[49] *See*, 47 CFR Section 2.1043. Two classes of permissive changes are available: a Class I permissive change is a change to the equipment which results in no change to or a decrease in the levels of the emissions reported to the Commission; a Class II permissive change is a change to the equipment which results in an increase in the levels of the reported emissions yet still permits the equipment to remain in compliance with the emission standards.

[50] *See*, 47 CFR Sections 2.907, 2.931.

[51] The filing from Linear resulted in the release of an *Erratum*. *See*, *Erratum* in Docket No. 87-389, DA 87-1760, released December 16, 1987.

[52] *See*, 47 CFR Sections 2.951-2.957.

[53] *See*, *Order Granting Limited Waiver*, FCC 85-204, adopted April 23, 1985.

[54] The definition of a biomedical telemetry device proposed in the *Notice* reflected the fact that these were the only devices proposed to be permitted to be employed as multiple transmitters. This distinction is no longer required, and the proposed definition is being changed accordingly.

[55] *See*, *Memorandum*, *Opinion and Order*, Docket No. 85-301, 3 FCC Rcd 6491 (1988).

[56] *See Memorandum*, *Opinion*, *and Order*, Docket No. 87-107, 3 FCC Rcd 4222 (1988).

[57] *See*, 47 CFR Sections 15.65-15.68 of the current regulations.

[58] While the current regulation, 47 CFR Section 15.66, specifies a 12 dB UHF noise figure, the Commission orders that amended this section and implemented the 12 dB noise figure were overturned by the U. S. Court of Appeals for the District of Columbia Circuit on September 17, 1980. *See*, Electronic Industries Ass'n. Consumer v. FCC, 636 F.2d 689 (D.C. Cir. 1980). Thus, the current noise figure requirement, which is being retained in this Order, is 14 dB.

[59] This change to the regulations is exempt from the notice and comment provisions contained in the Administrative Procedures Act in accordance with 5 USC 553(b)(A). Notice and public comment are unnecessary since this change adopts a non-controversial amendment that merely extends an application of the existing rules and should not result in degradation of UHF TV reception.

[60] FCC Form 740 is required to be filed whenever a radio frequency device is imported into the United States. *See*, 47 CFR Sections 2.1201-2.1219.

[61] We are retaining at this time the present exemptions for digital devices. These exemptions are contained in the current Section 15.801 of the rules and in OST Bulletin No. 62, "Understanding the FCC Regulations Concerning Computing Devices," May 1984. Changes to these exemptions may be addressed in a future rule making proceeding.

[62] *See*, 47 CFR Section 2.106, the Table of Frequency Allocations. This table was amended to include the 9-10 kHz band by the Second Report and Order in Docket No. 80-739, 54 RR 2d 1500 (1983).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-144

In the Matter of

Review of Technical Parameters
for FM Allocation Rules of Part 73,
Subpart B, FM Broadcast Stations

THIRD REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 15, 1989; Released: April 10, 1989

By the Commission: Commissioner Quello dissenting and issuing a statement; Commissioner Dennis issuing a separate statement at a later date.

INTRODUCTION

1. The Commission has under consideration the last of a number of proposed FM Broadcast technical rule revisions that became necessary as a result of the creation of three new station classes in BC Docket 80-90. This *Third Report and Order* (*Third Report*) amends Part 73 of the Commission's Rules to provide a uniform level of protection for FM receivers from intermediate frequency (IF) interference.[1] Specifically, we are adjusting the minimum distance separation requirements for IF-related FM stations[2] to prevent overlap of their predicted 36 mV/m median field strength contours, regardless of the classes of the two stations. Also, we are adding a new minimum distance separation requirement applicable only to FM Channel 253 (98.5 MHz) and TV Channel 6, based on this same protection criterion.[3] We believe that these requirements constitute a reasonable standard that will preclude only those channel allocations and station assignments likely to result in IF interference.

BACKGROUND

2. The Commission initiated this proceeding in 1986 by adopting a *Notice of Proposed Rule Making* (*Notice*)[4] proposing to refine certain rules that were affected by its previous action in BC Docket No. 80-90,[5] but were not given detailed consideration in that proceeding.[6] In 1987, we adopted a *First Report and Order*[7] resolving two of the issues raised in the *Notice*. The five remaining proposals were addressed in a *Second Report and Order*.[8] Four of these were resolved in the *Second Report*, but action on the fifth, concerning IF distance separation requirements for the newly created station classes, was deferred pending procurement of additional information necessary to assist us in making a decision.

3. IF distance separation requirements are contained in Section 73.207 of the Commission's Rules. This section specifies, by station class, the minimum distance that each FM station must be spaced from other FM stations that operate on frequencies separated by 10.6 or 10.8 MHz (53 or 54 channels apart). The required spacings are intended to reduce the likelihood of IF interference ocurring in broadcast FM receivers that employ 10.7 MHz as their first IF.[9] Requiring such stations to be located at least as far apart as the specified distances limits the geographical area within which a receiver would be likely to encounter two relatively strong FM broadcast signals from IF-related stations. The current spacings specified for Classes A, B, and C (the original classes) were intended to avoid the overlap of 20 mV/m field strength contours.[10] However, as we recognized in the *Notice*, the specified distances are insufficient to prevent such overlap. Nevertheless, evidence of IF interference is limited to allegations made by several parties to this proceeding, which is contradicted by the experiences of others. We are not aware of complaints by the public or broadcasters which can be attributed to IF interference. This suggests that the existing lesser spacings are adequate.

4. In BC Docket 80-90, the Commission simply took the existing IF distance separation requirements for the large Class B and C stations and applied them to the new intermediate size classes B1, C2, and C1. Consequently, stations in these new classes must currently meet the same requirements as the largest stations, even though they generally operate with lower ERP and HAAT. For these new classes, it seems that some reduction in IF spacings is appropriate. Therefore, in the *Notice* we proposed to reduce the spacings for the new classes to those necessary to prevent the overlap of the 30 mV/m field strength contours.[11] We based this proposal on the current rules for the old classes, which prevent the overlap of field strength contours varying approximately from 24 mV/m to 36 mV/m (30 being halfway between 24 and 36). Our purpose in proposing the reduced spacings for Class B1, C1 and C2 stations was simply to adjust the rules to provide approximately the same protection for these new classes as has existed for Class A, B and C stations since 1965.

5. However, in the *Second Report*, we found the record developed in response to the *Notice* with regard to the issue of IF spacings to be inconclusive. Several of the commenters had indicated that there is no interference problem and that IF spacing requirements should be abolished or relaxed for all of the station classes, new and old. Others stated that IF interference is a serious problem and that we should not change any of these requirements. Although IF interference results primarily from receiver inadequacies, we had received no comments or information from receiver manufacturers or trade organizations representing receiver manufacturers. Additionally, our laboratory was then in the process of evaluating IF interference susceptibility in various categories of consumer FM broadcast receivers, and had not yet reported its findings.

6. Considering these factors, we concluded in the *Second Report* that adoption at that time of minimum distance separation requirements based on the 30 mV/m protection level would have been premature. However, we stated our belief that we should not indefinitely hold the new station classes to a stricter standard than the one that has produced no public complaints over a period of 22 years. We also stated that a more complete record might enable us to determine an appropriate standard that could

be used to develop minimum distance separation requirements for all of the various class relationships, providing a consistent level of protection.

7. Thus, in March of 1988, we issued a *Further Notice of Proposed Rule Making* (*Further Notice*) [12] with the goal of developing a more comprehensive record concerning the IF issue. The *Further Notice* also expanded the scope of the proposal to include consideration of existing IF distance separation requirements applicable to the pre-BC Docket 80-90 FM station classes (A, B and C) and possible new IF minimum distance separation requirements applicable to TV Channel 6 allotments and assignments in the vicinity of FM Channel 253 allotments and assignments (and vice versa).

8. In the *Further Notice* we proposed IF minimum distance separation requirements for all FM station classes and for TV Channel 6 and FM Channel 253 stations based on a uniform protection level of 36 mV/m. Noting that the available test reports and the existing record in this proceeding did not support the choice of any particular protection level, we selected 36 mV/m because it is the least restrictive level with which we have satisfactory long-term operating experience. We invited interested parties, particularly receiver manufacturers or organizations representing receiver manufacturers, to submit further data or test results that support or oppose on technical grounds our choice of 36 mV/m, or to suggest an alternative protection level.

9. The comment period for the *Further Notice* was extended (pursuant to requests filed by interested parties)[13] to provide sufficient time for commenters to examine the technical data in a report prepared by our laboratory (OET Report) on the susceptibility of commercial FM receivers to IF interference.[14] The period for reply comments was also extended in order to permit a complete and full record to be developed.[15]

COMMENTS

10. Fourteen parties filed formal comments in response to the *Further Notice* and five submitted replies to these initial comments.[16] The majority of the commenters support our proposal generally, but several oppose it or suggest modifications. Three commenters, Educational FM Associates (EdFM), Edens Broadcasting, Inc. (Edens) and WEDR, Inc. (WEDR) suggest that the Commission abandon IF distance separation requirements in favor of a rule or rule waiver policy allowing station locations that do not cause overlap of the predicted median 36 mV/m contours of IF-related stations, taking into account average terrain and directional antenna characteristics. Doing so, they claim, would provide greater site location flexibility, particularly for non-commercial educational stations which EdFM alleges do not usually operate at the commercial class maximums. Chapman S. Root Revocable Trust (Root) filed a reply opposing Edens' comments. Root argues that IF minimum distance separation requirements should be strictly adhered to rather than using a contour overlap method.

11. Key Broadcasting, Inc. (Key), although supporting the Commission's proposal, suggests that it does not go far enough. Key states that it has operated a Baltimore, Maryland station (WQSR) short-spaced to an IF-related station for many years and has never received a complaint attributable to IF interference. Key believes that IF distance separation requirements should be abolished entirely, but that if the Commission retains them, the protection level should be no more restrictive than 40 mV/m.[17] Timothy C. Cutforth, P.E. (Cutforth), a consulting engineer, and the Association of Federal Communications Consulting Engineers (AFCCE) both support the concept of a uniform protection level for all station class relationships. These commenters believe that the level proposed, 36 mV/m, seems about right, however, AFCCE states that additional laboratory testing should be conducted in order to verify this.

12. Greater Media, Inc. (Greater Media) opposes any change in the current IF rule on the grounds that it would cause "new IF interference to millions of receivers currently in use and likely to remain in use for many, many years." To support this contention, Greater Media supplied a statement by it's Vice President of Radio Engineering, Mr. Milford K. Smith, Jr., which relates his experiences with IF interference while serving as Chief Engineer (1967-1970) of WHMP-FM, Northampton, Massachusetts. Mr. Smith recalls receiving many complaints of IF interference during that time, resulting from the operation of a nearby IF-related station, WFCR. Mr. Smith further states that he returned to the area on July 8, 1988 with ten consumer grade FM receivers of types that he feels are likely to be used by the general public. At eight locations, Mr. Smith measured and recorded the field strengths of the two aforementioned IF-related stations and noted, for each of the receivers, whether any IF interference was experienced. Because about half of the receivers did experience interference, Mr. Smith concludes that IF interference continues to be a problem and that the Commission would therefore be ill advised to change the current IF distance separation requirements. Key, in reply, asserts that the Greater Media (Smith) study is flawed because, among other things, the measured signal strengths from the two stations were not equal or nearly equal at the locations where the trials were conducted, suggesting that the interference reported by Smith was not IF interference, but interference of some other type.

13. The Association for Broadcast Engineering Standards (ABES) and Greater Media believe that the OET Study underestimates the IF interference susceptibility of FM receivers typically used by consumers, and therefore should not serve as a basis for the proposed 36 mV/m protection level. ABES also submitted an engineering statement that contains histograms showing the number of IF-related licensed FM station pairs as a function of separation distance. ABES notes that, according to this data, there are relatively few IF-related pairs separated by distances near the current minimums. From this it concludes that there is little benefit (in terms of site location flexibility) to be realized if the Commission's proposal were to be adopted. The ABES engineering statement postulates that the current disparity in protection level between the various class combinations is a result of gross rounding of the originally calculated distances and changes in the class maximum facilities over the intervening two decades.

14. The National Association of Broadcasters (NAB) recommends that the Commission "go slow" in adjusting the IF distance separation requirements. NAB states that the problem of IF interference rests in "current receiver design practice," and that "the receiver industry should be allowed time to embark upon a standardization process," the outcome of which would determine the protection

level to be used.[18] NAB claims that no specific protection level is likely to protect all receivers currently in use, and urges the Commission to retain the current IF spacing requirements pending receiver industry efforts to establish standards that would allow determination of an appropriate protection level.

15. The Electronics Industries Association/Consumer Electronics Group (EIA/CEG) in its comments supplied manufacturers' test data for FM receivers described as "small inexpensive receivers without an antenna connection." This data, according to EIA/CEG, shows that receivers of this type would be "severly penalized" if the Commission's proposal were implemented. EIA/CEG states that there is a technical basis for the disparate protection levels, but does not explain this contention. EIA/CEG recommends that the Commission retain the current IF distance separation requirements.

16. The matter of IF interference resulting from proximity of an FM Channel 253 station and a TV Channel 6 station was addressed in five comments and two replies. 222 Corporation (222), licensee of FM station WCKW in Laplace, Louisiana, reports that it has experienced interference problems within its service area for years as a result of the assignment of both a TV 6 and FM 253 in the New Orleans area. 222 suggests that the Commission solve this particular situation by moving the FM station to a different channel. EIA/CEG comments that its manufacturers have reported no interference to TV 6 reception caused by FM 253 operations.[19] NAB supports the proposed TV 6-FM 253 requirement but suggests a tighter standard -- preventing overlap of the 30 mV/m contours -- until the receiver industry develops its standard. ABES recommends that the Commission study the matter further before taking action. AFCCE states that there is no documented need for the proposed TV 6-FM 253 requirement. The Association of Maximum Service Telecasters (MST), in reply, comments that although the TV 6-FM 253 proposal is a "welcome demonstration of Commission concern over maintaining the quality of over-the-air broadcast services", it believes that the record does not show a need for the proposed requirement.

DISCUSSION

17. Currently, our rules and policies with regard to FM IF interference result in arbitrarily varying levels of protection and thus are technically inconsistent. As noted earlier, the minimum spacings now required in Section 73.207 of our rules for IF-related stations provide different protection levels for various FM station class combinations.[20] The distances for Classes B1 and C1 were not based on any calculated standard but were simply taken from the next larger classes (Class B and C, respectively) as a temporary measure in BC Docket 80-90. Licensees of grandfathered short-spaced stations and other applicants requesting a waiver of the IF distance separation requirements currently must show, among other things, that a proposed modification would not cause the overlap of the 20 mV/m predicted median field strength contours of IF-related stations. Finally, there are currently no requirements at all for the TV Channel 6-FM Channel 253 IF relationship, which presents at least as much potential for IF interference as do the pure FM requirements.

18. We stated in the *Further Notice* that there is no technical justification for the disparate treatment of these similar situations. We have seen nothing in the record in this proceeding to persuade us otherwise. An FM receiver does not need more protection from two IF-related Class B1 stations than from two IF-related Class A stations. Nor does this same receiver need less protection from TV 6 - Channel 253 IF interference than it does from two IF-related Class C1 stations. We believe that it is good public policy for our technical allotment and assignment requirements to be based upon reasonably derived and consistently applied technical standards. As some commenters mentioned, we may consider waivers of our technical rules in cases wherein special unique or unusual circumstances may so dictate, however, even in these cases we believe that a clear understanding by all parties of the technical principles underlying the rule for which the waiver is sought is essential to the proper disposition of such requests.[21] In view of the foregoing, we conclude that *one specific protection level for IF interference should be selected and applied uniformly.*

19. In the *Further Notice*, we requested data or test results, particularly from receiver manufacturers or organizations representing them, that would quantitatively support or oppose our choice of a uniform 36 mV/m protection level, or would suggest an alternative level. EIA/CEG did submit some data bearing on this matter, but we received no separate comments from receiver manufacturers. In spite of the helpful reports submitted by Greater Media, 222, ABES and others, the record still does not point to any one particular protection level as an optimum choice.

20. A few of the commenters made considerable effort to interpret the OET Report in various, sometimes contradictory, ways. Others challenged or criticized its methodology or conclusions. Boiled down to its essentials, however, the OET Report says only that given two undesired IF-related FM signals of a given equal strength, the "average" commercial FM receiver[22] will provide satisfactory reception (free of objectionable IF interference) of a desired signal only if that desired signal has a certain minimum strength. Expressed another way, if the desired signal is strong enough, it can override the interference.[23] Converting the signal levels from dBm at the antenna terminals of the "average" receiver to corresponding field strength values in mV/m (which involves certain assumptions about the antenna that would be used), the approximate quantitative results are as follows:

Undesired Strength (Protection level)	**Minimum necessary desired signal strength for satisfactory reception**
36 mV/m	3 to 25 mV/m depending on frequency
20 mV/m	1 to 8 mV/m depending on frequency

21. Obviously, there is a trade-off between protection level (risk of interference) and site flexibility. That is, a lower level of protection permits shorter separation distances, which in turn allow a greater number of potential transmitter sites. Greater Media states in its comments that such a trade-off "should never favor the latter policy consideration unless it can be proven that restrictions on licensees have in fact substantially reduced opportunities for service to the public." ABES in its comments states that the vast majority of FM stations are now separated from IF-related stations by much more than the current minimum distance separation requirements, and therefore the benefits to be gained, in terms of site flexibility, are limited.[24]

22. We believe, however, that licensees of certain classes of FM stations should not be unnecessarily constrained by an inconsistent technical standard, while others, operating under a less restrictive standard, do not appear to have experienced any significant problems over the years. Class A stations are the most numerous and therefore most likely to be involved in an IF situation. Class C stations are the most powerful and thus are the stations that would cause the largest overlap area. Yet the current IF distance separation requirements for both the Class A to A and Class C to C combinations produce a protection level of 36 mV/m. No commenter suggested tightening the requirements for these station combinations. Furthermore, we find no justification in the record for setting or maintaining a more restrictive protection level for the other station class combinations.

23. In summary, because we consider it important that our assignment rules have a consistent technical foundation, we believe that our IF separation requirements should be based on a uniform protection level. In view of years of actual operation by some classes of FM stations under requirements resulting in a protection level of 36 mV/m, we believe that this level is sufficient to protect FM broadcast receivers currently in use. We encourage receiver manufacturers to attempt to design receivers that are immune to IF interference, as the record indicates this can be done without making such receivers significantly more expensive. We reject the contention of Greater Media and others that increased interference will result from this minor revision of our rules. Although NAB and EIA/CEG recommend that we retain the current distances, we see no public benefit to retaining the technically inconsistent distances. Accordingly, we are revising the required minimum FM IF spacings as we proposed in the *Further Notice*. Furthermore, because the aural transmitter of a TV station operating on Channel 6 is similar to an FM station with regard to potential for IF interference, we are adding a new requirement to address this interference potential.[25]

24. Some of the commenters suggested that we abandon distance separation requirements in favor of a prohibition on overlap of the predicted median field strength contours at the selected protection level. This approach could be useful in short-spaced cases, where the intent is to provide the required protection by using a directional antenna.[26] In fact, it is our long-standing policy to use contour overlap procedure in cases involving IF-related stations that are already short-spaced. However, we believe we should not expand on this policy at this time, since we did not contemplate doing so in the *Further Notice*.

25. In view of our recent proposal to increase the maximum permitted effective radiated power of Class A FM stations[27], licensees of these stations should be aware that, although we are not herein increasing the minimum IF distance separation requirements for Class A stations, we will do so in order to maintain the 36 mV/m protection level if the proposed power increase is ultimately adopted.

26. An analysis of our FM licensing records reveals that there are currently 22 pairs of IF-related licensed FM stations that are short-spaced under the current rule. Under the revised rule, 12 of these 22 station pairs will no longer be short-spaced, and will be subject to applicable IF distance separation requirements. The remaining short-spaced stations may continue to operate as authorized, however, applications to modify these stations in ways that increase the area of overlap of the stations' 36 mV/m median field strength contours will not be accepted.

27. A similar analysis using both the TV and FM engineering databases reveals 7 locations where a TV Channel 6 and and FM Channel 253 are short-spaced under the new requirement. (*See* Appendix B.) These stations may continue to operate as authorized, however, applications to modify these stations in ways that increase the area of overlap of the FM station's 36 mV/m median field strength contour and the 36 mV/m contour of the TV station's aural transmitter will not be accepted.

CONCLUSION

28. Some of the comments in this proceeding expressed a concern that the Commission has embraced a policy generally promoting toleration of increased interference in the FM service simply to increase the number of stations, and that these FM IF spacing revisions are merely part of that philosophy. This is not the case. Although we do seek to remove unnecessary regulatory barriers that stand in the way of opportunities for new or expanded service to the public, we remain committed to preserving or improving the quality of all of the broadcast services.

29. In this *Third Report and Order*, we are establishing a uniform protection level to serve as a basis for IF distance separation requirements, adjusting some of the existing requirements to meet the uniform protection level, and establishing a new requirement to address a previously unidentified potential source of IF interference. The new uniform protection level is not an untried standard, but rather it is one that has been in use for some FM station classes for many years without significant problems. Its expansion to include the other classes of FM stations will result in more reasonable and consistent treatment of FM station applications, with no significant likelihood of additional interference.

30. We have previously determined that Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354) does not apply to this rule making proceeding because it will not have a significant economic impact on a substantial number of small entities.

31. The actions contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements, and they will not increase or decrease burden hours imposed on the public.

ORDERING CLAUSES

32. Authority for the action taken herein is contained in Sections 4(i), 303(f) and 303(r) of the Communications Act of 1934, as amended.

33. Accordingly, IT IS ORDERED That Part 73 of the Commission's Rules and Regulations ARE AMENDED, effective **May 17, 1989,** as set forth in Appendix A. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

47 CFR Part 73 is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. 47 CFR 73.207 is amended by revising TABLE A in paragraph (b)(1), and by adding a new paragraph (c). In TABLE A, the first three columns, entitled "Co-channel", "200 kHz", and "400/600 kHz" remain unchanged. The fourth column, entitled "10.6/10.8 MHz", is revised to read as follows:

§ 73.207 Minimum distance separation between stations.

* * * * *

(b) * * *

(1) * * *

TABLE A - MINIMUM DISTANCE SEPARATION REQUIREMENTS IN KILOMETERS (MILES)

Relation	Co - channel	200 kHz	400/600 kHz	10.6/10.8 MHz
A to A	* * *	* * *	* * *	8 (5)
A to B1	* * *	* * *	* * *	11 (6)
A to B	* * *	* * *	* * *	14 (9)
A to C2	* * *	* * *	* * *	14 (9)
A to C1	* * *	* * *	* * *	21 (13)
A to C	* * *	* * *	* * *	28 (17)
B1 to B1	* * *	* * *	* * *	14 (9)
B1 to B	* * *	* * *	* * *	17 (11)
B1 to C2	* * *	* * *	* * *	17 (11)
B1 to C1	* * *	* * *	* * *	24 (15)
B1 to C	* * *	* * *	* * *	31 (19)
B to B	* * *	* * *	* * *	20 (12)
B to C2	* * *	* * *	* * *	20 (12)
B to C1	* * *	* * *	* * *	27 (17)
B to C	* * *	* * *	* * *	35 (22)
C2 to C2	* * *	* * *	* * *	20 (12)
C2 to C1	* * *	* * *	* * *	27 (17)
C2 to C	* * *	* * *	* * *	35 (22)
C1 to C1	* * *	* * *	* * *	34 (21)
C1 to C	* * *	* * *	* * *	41 (25)
C to C	* * *	* * *	* * *	48 (30)

* * * * *

(c) The distances listed below apply only to allotments and assignments on Channel 253 (98.5 MHz). The Commission will not accept petitions to amend the Table of Allotments, applications for new stations, or applications to change the channel or location of existing assignments where the following minimum distances (between transmitter sites, in kilometers) from any TV Channel 6 allotment or assignment are not met:

MINIMUM DISTANCE SEPARATION FROM TV CHANNEL 6 (82-88 MHz)

FM Class	TV Zone I	TV Zones II & III
A	16	20
B1	19	23
B	22	26
C2	22	26
C1	29	33
C	36	41

3. 47 CFR 73.213 is amended by redesignating the existing text as paragraph (a) and adding a new paragraph (b) to read as follows:

§ 73.213 Grandfathered short-spaced stations.

* * * * *

(b) Stations at locations authorized prior to [insert date 30 days after date of publication in the Federal Register] that did not meet the IF separation distances required by §73.207 and have remained short-spaced since that time may be modified or relocated provided that the overlap area of the two stations' 36 mV/m field strength contours is not increased.

4. 47 CFR 73.610 is amended by adding a new paragraph (f) to read as follows:

§ 73.610 Minimum distance separations between stations.

* * * * *

(f) The distances listed below apply only to allotments and assignments on Channel 6 (82-88 MHz). The Commission will not accept petitions to amend the Table of Allotments, applications for new stations, or applications to change the channel or location of existing assignments where the following minimum distances (between transmitter sites, in kilometers) from any FM Channel 253 allotment or assignment are not met:

MINIMUM DISTANCE SEPARATION FROM FM CHANNEL 253 (98.5 MHz)

FM Class	TV Zone I	TV Zones II & III
A	16	20
B1	19	23
B	22	26
C2	22	26
C1	29	33
C	36	41

APPENDIX B

CHANNEL 6 TV STATIONS AND CHANNEL 253 FM STATIONS LICENSED IN THE SAME AREA

KRMA-TV	Denver, Colorado
KYGO-FM	Denver, Colorado
WDSU-TV	New Orleans, Louisiana
WYLD-FM	New Orleans, Louisiana
WOWT	Omaha, Nebraska
KQKQ-FM	Council Bluffs, Iowa
KOTV	Tulsa, Oklahoma
KVOO-FM	Tulsa, Oklahoma
KOIN-TV	Portland, Oregon
KUPL-FM	Portland, Oregon
WIPR-TV	San Juan, Puerto Rico
WPRM-FM	San Juan, Puerto Rico
KFDM-TV	Beaumont, Texas
KHYS	Port Arthur, Texas

APPENDIX C

In response to the *Further Notice of Proposed Rule Making* in MM Docket 86-144, comments were filed by:

Department of Aeronautics, State of Nebraska

Timothy C. Cutforth, P.E.

Educational FM Associates

Key Broadcasting Corporation

WEDR, Inc.

Peter and John Radio Fellowship, Inc. (withdrawn)

Association for Broadcast Engineering Standards, Inc.

Edens Broadcasting, Inc.

Greater Media, Inc.

National Association of Broadcasters

Consumer Electronics Group/Electronic Industries Association

Association of Federal Communications Consulting Engineers

222 Corporation

Bromo Communications, Inc.

Replies were filed by:

Association of Maximum Service Telecasters

Chapman S. Root Revocable Trust

Greater Media, Inc.

Key Broadcasting Corporation

Peter and John Radio Fellowship, Inc. (withdrawn)

FOOTNOTES

[1] IF interference to FM broadcast receivers causes increased background noise which degrades reception of a desired signal. In more severe cases, it is characterized by reception of the audio, often distorted, of one or both of two stations, regardless of the position of the receiver's tuner dial. Thus, when it occurs, this phenomenon can prevent reception by the affected receiver of most or all of the FM stations in the area.

[2] Two FM stations are considered to be IF-related when their assigned frequencies are separated by 10.6 or 10.8 MHz (53 or 54 channels).

[3] The aural carrier (at 87.75 MHz) from a TV station on Channel 6 is IF-related to FM channel 253 (98.5 MHz).

[4] *See Notice of Proposed Rule Making* in MM Docket 86-144, 104 FCC 2d 160 (1986), 51 Fed. Reg. 15927, published April 29, 1986.

[5] *See Report and Order*, 94 FCC 2d 152 (1983); *recon., granted in part and denied in part*, 97 FCC 2d 279 (1984).

[6] In BC Docket 80-90, the Commission amended its Rules to expand FM service to the public by increasing the number of station classes, thereby providing new opportunities for additional stations and upgrading of existing stations. The Commission now authorizes six classes of commercial FM broadcast stations: A, B1, B, C2, C1, and C. Three of these classes, B1, C2, and C1, were created in BC Docket 80-90. At that time, certain existing rules were modified merely to accomodate the new classes. In general, the approach was to apply existing rules to new Classes B1 and C2 as if they were Class B, and likewise to treat new Class C1 as though it was Class C. The Commission indicated that these rules could be refined later, based upon a record addressing them in greater detail.

[7] *See First Report and Order* in MM Docket 86-144, 2 FCC Rcd 660 (1987), 52 Fed. Reg. 8259, published March 17, 1987. The Commission amended the rules to permit any class of station to be allotted on 20 channels which were previously restricted to Class A operation. Also, the Commission declined to amend the rule which provides for the classification of stations by zone based on transmitter location rather than the location of the community of license.

[8] *See Second Report and Order* in MM Docket 86-144, 2 FCC Rcd 5693 (1987), *recon. granted in part and denied in part*, 3 FCC Rcd 2477 (1988). The Commission (1) adopted a specific method for classifying FM stations according to their effective transmitting power and antenna height, (2) modified the required procedures for predicting FM station coverage to accomodate beam-tilt transmitting antennas, (3) modified the formula used for calculating the distance between FM stations to improve its accuracy, and (4) restricted modifications to grandfathered short-spaced stations to those which will not increase the potential for interference.

[9] Most consumer FM broadcast receivers use 10.7 MHz as their first IF.

[10] *See Report and Order* in Docket No. 15934, FCC 65-575, 30 Fed. Reg. 8680, July 9, 1965, 5 RR 2d 1679 (adopted June 30, 1965).

[11] For the sake of brevity, the Commission refers in this document to the criterion of preventing overlap of two equal contours of IF-related stations as a particular "protection level". For example, preventing overlap of two stations' 30 mV/m contours is referred to as a "30 mV/m protection level."

[12] *See Further Notice of Proposed Rule Making* in MM Docket 86-144, 3 FCC Rcd 1661 (1988).

[13] *See Order Granting Motion for Extension of Time for Filing Comments*, DA 88-704, 3 FCC Rcd 2818 (1988).

[14] *See* "Laboratory Test Results of the FM-IF Interference in Broadcast Receivers, Project EEB-86-8", OET Technical Memorandum, FCC/OET TM87-4, June 1987, prepared by J. Ray Hallman and Kenneth R. Nichols.

[15] *See Order Granting Request for Extension of Time to File Reply Comments,* DA 88-1184, 3 FCC Rcd 4773 (1988).

[16] A list of the parties filing comments and replies is attached as Appendix C.

[17] When viewed in the context of protection levels, higher signal strengths correspond to less protection from interference but greater site flexibility. This is because the higher signal strengths are found closer to the transmitting site, therefore the required separation distances can be shorter.

[18] NAB indicates that the National Radio Systems Committee (NRSC) is currently forming a subgroup to consider and make recommendations on issues such as the IF susceptibility of receivers.

[19] IF interference that is the subject of this proceeding is interference to FM receivers only. Channel 253 FM stations do not cause IF interference to television reception.

[20] The following are examples of the protection levels that result if maximum facility IF-related FM stations are located at the current minimum spacings contained in §73.207:

CLASS RELATIONSHIP	PROTECTION LEVEL
A to A	35.6 mV/m
B1 to B1	11.5 mV/m
B to B	24.6 mV/m
C1 to C1	17.5 mV/m
C to C	36.7 mV/m

[21] Notwithstanding our use, in this proceeding, of contour overlap calculations to define protection levels, meeting or exceeding the required separation distances continues to constitute the only measure of compliance with §73.207. Applicants seeking a waiver of §73.207 are advised that alleged discrepancies between the separation distances in the revised rule and the contour overlap calculations presumed to underlie them, do not in themselves constitute sufficient grounds for such a waiver. Other factors germane to each individual case *(e.g.,* lack of an alternative antenna site) must be considered when such waiver requests are evaluated.

[22] By average performance with 90% confidence, the OET Report means that if a receiver is selected at random from the universe of all FM receivers, one can be 90% sure that it will perform at least as well as the data indicates.

[23] This information is expressed graphically as Figure 5 in the OET Report. Note however that the lines drawn between the points probably do not express the true curve of the susceptibility characteristic of the "average" receiver because measurements were made at only four "desired" frequencies.

[24] If few FM stations have chosen locations where the IF minimum distance separation requirements are an important factor, there is no reason to expect many to decide to do so in the future simply because the Commission revises §73.207. Furthermore, assuming that only a few stations relocate as a result of our application of a uniform standard, the already unlikely possibility of IF interference occuring as a result of such relocations is even less probable.

[25] The new and revised distances are calculated to prevent overlap of the predicted median 36 mV/m contours, based upon the FM F(50,50) field strength curves *(see* §73.333, Figure 1) and assuming the use of maximum facilities by both stations. Consistent with the practice employed for the other minimum distance separation requirements in §73.207, all distances are rounded to the nearest kilometer.

[26] *See Report and Order* in MM Docket 87-121, FCC 88-406, adopted December 12, 1988. The Commission adopted rules to permit applicants for commercial FM broadcast stations to request authorization of antenna sites that are nominally short-spaced to other co-channel and first, second, and third adjacent channel facilities, provided that the service of these other facilities is protected in accordance with well established criteria. However, those rules do not allow short-spacing for IF-related stations. The Commission indicated that the technical matters underlying IF distance separation requirements are different from those considered in MM Docket 87-121, in that reception of signals from other nearby FM stations (as well as the two IF-related stations) may be affected. *See also* footnote 21, *supra.*

[27] *See Notice of Proposed Rule Making* in MM Docket 88-375, FCC 88-251, released September 12, 1988.

DISSENTING STATEMENT OF COMMISSIONER JAMES H. QUELLO

In re: Review of Technical Parameters for FM Allocation Rules of Part 73, Subpart B, FM Broadcast Stations (Minimum Distance Separations for IF Related Stations)

I dissent ot the majority's adopting a uniform IF interference standard. The record does *not* demonstrate that the 36 mV/m standard is sufficient to prevent additional interference in the FM band. On the contrary, data in the record compel a more cautious approach. The burden in the instant proceeding should be placed squarely on those parties seeking to change our current IF separation requirements. Indeed there is presumption against changing existing policies unless the modifications are supported by record evidence.[1]

Data submitted in this proceeding examining various types of receivers demonstrate that the Commission should not relax its IF spacing requirements. The Consumer Electronics Group of the Electronics Industry Association studied inexpensive Class I type receivers and concluded that "adoption of the proposed uniform level of protection from IF interference would result in increased interference and a consequent reduction in the quality of the FM broadcast service."[2] Similarly, data submitted by NAB argues against relaxing our IF interference standards.[3] A significant number of parties suggested that the Commission retain its existing rules until further study is conducted or standards for receiver design are improved.[4] Even the OET report, which examined the potential interference on higher quality Class II-IV receivers, concluded that relaxing current IF separations may lead to increased interference in the band.[5] OET's analysis concerned an increase from a 20 mV/m to a 30 mV/m protection criterion. The study noted that such an increase may be feasible, depending on the policy trade-off of the additional degradation versus additional FM broadcast service.[6] It should be noted however, that OET's report examined the potential for interference using a 30 mV/m protection standard. The majority's disregard for the potential adverse interference is, therefore, exacerbated by the fact that the item adopts a more relaxed standard -- 36 mV/m -- than that employed in OET's policy analysis.

Despite the evidence in the record, the majority supports a more relaxed standard on three principal grounds: (1) there is a trade off between IF interference protection and site flexibility; (2) the existing rules are inconsistent, restricting Class B1, B and C1 stations more than Class A or Class C stations; and (3) lack of complaints concerning separations between Class A and Class C stations that currently employ the 36 mV/m IF protection standard.[7]

I agree there are inconsistencies in the present rules. Generally, the commission should endeavor to develop consistent uniform rules whenever possible. However, the desire to create a uniform set of rules should not override countervailing public interest concerns, especially where interference is involved.

The policy trade off between interference protection and site flexibility does not justify a uniform relation of the rules. Given the potential increase in interference, I believe we should treat site problems on a specific case-by-case basis. Such an approach would minimize the risk of additional interference that is associated with a blanket relaxation of the IF protection rules. Moreover, a study submitted by the Association for Broadcast Engineering Standards, Inc. demonstrates that existing IF separation standards do not seriously impact stations in their choice of transmitter sites.[8] Accordingly, there is little or no benefit to offset the harm of increased interference.

The inconsistencies in IF spacing between Class B1, B, C1 stations and Class A and C stations is neither contrary to the public interest nor arbitrary. The IF standards were established at the time each service was created. Basic administrative law requires that the Commission provide reasoned analysis for changing its position.[9] The data demonstrate that IF interference occurs in a variety of situations and at different protection levels, depending on the quality of receiver. In this regard, lack of a uniform receiver standard makes the selection of a uniform IF standard even more arbtrary than the status quo. At least we have real world experience with our existing rules. Given the uncertainty in this area, maintenance of the status quo is justified if the Commission is to avoid the risk of increased interference across the FM bank. I submit that the administrative need for uniformity is not sufficient to justify changing the present rules.

Finally, assuming *arguendo*, that a uniform standard is in the public interest, there is no reason to adopt the more relaxed 36 mV/m protection standard. The majority states that stations operating under this standard (Class A and Class C stations) "do not appear to have experienced any significant problems over the years."[10] I believe it is bad policy to make interference decisions on the ground that no one has complained. Most radio listeners that encounter interference will simply switch stations without reporting the problem. Moreover, because interference varies depending on receiver quality, the majority has no idea whether the 36 mV/m standard is appropriate. The Commission has the responsibility to avoid policies that merely create additional interference. We should not delegate our responsibility by establishing a "public grumbling" standard for frequency management. It is worth remembering that the majority's decision for the first time adopts a more relaxed standard for all stations, thereby increasing the potential for IF interference across the entire band. In this regard, the problem may be exacerbated depending on the outcome of our pending proceeding concerning increases in power for Class A stations. On balance, I do not believe that the lack of complaints affords sufficient assurance that degradation in the band will not occur. This is especially true where there is data on the record demonstrating that relaxed standards may create additional IF interference. In any event, it certainly does not justify lessening the protections for other classes of FM stations. Simply stated, the Commission lacks the hard data that is necessary to justify a change from the status quo.

Of course, the perfect solution lies with improving the design of FM receivers. The data demonstrate that interference problems will vary considerably, depending on the quality of receiver. Most commenters agree that improved design will significantly reduce the IF interference problem. Accordingly, I support the idea that the broadcast and consumer electronics industries should adopt new receiver performance standards. In this regard, the Commission should take the lead by endorsing an industry developed standard that will balance the need for additional IF protection against increased costs to consumers from higher quality radio receivers. At this point in time, however, we should craft our interference rules to be consistent with the realities of the radio receiver marketplace. Our decision today runs the risks of increased interference to a significant number of existing receivers.

On balance, there is little or no evidence to justify relaxing the IF interference standard to 36 mV/m protection level. The record in this proceeding supports a cautious approach to this problem, perhaps a case-by-case examination of each potential IF interference situation. The blanket, uniform protection standard adopted in this proceeding is anything but cautious. I agree that the majority's decision will provide a consistent standard for all classes of FM facilities. However, our public interest concerns should encompass far more than an administrative uniformity. Given the lack of evidence in this proceeding that would justify such a change, I must dissent to the majority's decision.

FOOTNOTES FOR STATEMENT

[1] *See Motor Vehicle Manufacturers Association v. State Farm Automobile Insurance Co.*, 463 U.S. 29, 41, 42 (1983).

[2] *Comments of the Consumer Electronics Group of the Electronic Industries Association*, filed in MM Docket No. 86-144, July 12, 1988, at 1. The test primarily involved inexpensive receivers without an antenna connection. These receivers constitute a large segment of the exsiting radio market. The results indicated the level of interference expected with present separations would increase with 30 mV/m. However, the standard adopted by the Commission, 36 mV/m is even more relaxed, thereby increasing the potential for interference.

[3] National Association of Broadcasters, Department of Science and Technology, *A Review of the FM IF Taboo in Contemporary FM Broadcast Receivers in Laboratory Tests*, filed in Comments of the National Association of Broadcasters, filed in MM Docket No. 86-144, August 26, 1986. The study found that "there is amply evidence from these tests that the IF taboo exists and that rules to control such station configurations that contribute to is occurrence must be maintained." *Id.* 1. The report concludes that further tests are warranted because of the wide range in receiver models and general lack of information. *Id.*

[4] *See, e.g.*, Comments of the Association of Federal Communications Consulting Engineers, filed in MM Docket No. 86-144, July 12, 1988 at 3 (more definitive test data necessary to support relaxation of IF relaxation); Reply Comments of the Association

of Maximum Service Telecasters, filed in MM Docket No. 86-144, July 27, 1988 at 3 (further studies necessary before adopting new standard); Comments of the National Association of Broadcasters, filed in MM Docket No. 86-144, July 12, 1988 at 6 (retain existing protection until receiver industry establishes standard); Comments of Greater Media, Inc., filed in MM Docket No. 86-144, July 12, 1988 at 9-10 (test data and real world experience support retaining existing separations); Comments of Association for Broadcast Engineering Standards, Inc., filed in MM Docket No. 86-144, July 12, 1988 at 5, Appendix I (engineering report by Moffet, Larson & Johnson, Inc. supports retaining existing separations); Comments of National Public Radio filed in MM docket 86-144, August 26, 1986 at 11 (relaxation of rule would cause significant increase in interference); Reply Comments of A.D. Ring & Associates, P.C., filed in MM docket No. 86-144, September 9, 1986 at 7 (separation requirements should be changed only after receiver performance standards adopted).

[5] "Laboratory Test Results of the FM-IF interference in Broadcast Receivers, Project EEB-86-8," FCC/OET TM 87-4, June 1987.

[6] *Id.* at 7.

[7] *Third Report and Order* in MM Docket No. 86-144, FCC 89-62 adopted February 15, 1989 at para. 21.

[8] Comments of American Association for Broadcast Engineering Standards, *supra* note 4 at 2.

[9] *See Greater Boston Television Corporation v. FCC,* 444 F.2d 841, 852 (D.C. Cir. 1970) *clarified* 463 F.2d 268 (D.C. Cir. 1971).

[10] *Third Report and Order, supra* note 7 at para. 21.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

AMERITECH SERVICES Revisions to Tariff F.C.C. No. 2	Transmittal No. 246
NATIONAL EXCHANGE CARRIER ASSOCIATION Revisions to Tariff F.C.C. No. 5	Transmittal No. 338
NEW YORK TELEPHONE COMPANY Revisions to Tariff F.C.C. No. 41	Transmittal No. 949
SOUTHWESTERN BELL TELEPHONE COMPANY Revisions to Tariff F.C.C. No. 68	Transmittal No. 1748
US WEST Revisions to Tariff F.C.C. No. 1	Transmittal Nos. 214 and 218

ORDER

Adopted: January 5, 1989; Released: January 5, 1989

By the Chief, Common Carrier Bureau:

1. By the above-referenced transmittals, various local exchange carriers (LECs) have proposed revisions to their tariffs for access services to establish rates and charges for Special Access Individual Case Basis (ICB) High Capacity DS3 offerings.[1] The revisions are scheduled to become effective on dates ranging from January 6, 1989, to January 29, 1989.[2]

2. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of LECs' proposed ICB rates, designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings, and establishing a pleading cycle.[3] The above-referenced transmittals raise the same issues as those transmittals subject to our *Designation Order*. Therefore, the instant transmittals will be subject to the outcome of that investigation. We also grant the LECs listed above special permission to advance the effective dates of these transmittals.

3. Accordingly, IT IS ORDERED that Ameritech Services, Tariff F.C.C. No. 2, Transmittal No. 246, National Exchange Carrier Association, Tariff F.C.C. No. 5, Transmittal No. 338, New York Telephone Company, Tariff F.C.C. No. 41, Transmittal No. 949, Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal No. 1748, and US West, Tariff F.C.C. No. 1, Transmittal Nos. 214 and 218, are subject to the investigation instituted in CC Docket No. 88-136.

4. IT IS FURTHER ORDERED that the local exchange carriers listed in paragraph 3, *supra*, may file tariff revisions, to be effective on not less than one day's notice, in order to advance the effective dates of the above-referenced transmittals. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 89-7.

5. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

6. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, all local exchange carriers subject to this investigation shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for DS3 services which are the subject of such investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] We note that while the LECs' filings also propose ICB rates for other services, this Order deals only with the proposed ICB rates for DS3 and DS3-equivalent services.

[2] No petitions have been filed to reject, suspend, or investigate any of these transmittals.

[3] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (1988) (*Designation Order*); Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTHWESTERN BELL TELEPHONE COMPANY
Tariff F.C.C. No. 68

Transmittal No. 1726

Unbundling of
C-Conditioning Service

ORDER

Adopted: February 6, 1989; Released: February 7, 1989

By the Chief, Common Carrier Bureau:

1. Southwestern Bell Telephone Company (Southwestern) filed the above-referenced transmittal on November 10, 1988. With this filing, Southwestern proposes to unbundle its current C-Conditioning service into three new services. Southwestern Description and Justification (D&J) at 1.2 and 1.3. MCI Telecommunications Corporation (MCI) filed a petition to reject, or in the alternative to suspend and investigate, on November 25, 1988, and Southwestern replied to MCI's petition on December 9, 1988. The proposed tariff revisions are due to become effective on February 8, 1989.

2. C-Conditioning is a service used to reduce distortion on voice grade private lines. Southwestern's C-Conditioning service, as now offered, provides Improved Attenuation Distortion (IAD) and Improved Envelope Delay Distortion (IEDD) as a packaged offering. Southwestern D&J at 1.2. Southwestern explains that its current C-Conditioning service is generally used for voice grade circuits with end link parameters. *Id.*[1] With the proposed tariff revisions, Southwestern intends to unbundle its current C-Conditioning service into three new services -- IAD, IEDD, and a new C-Conditioning service with parameters that are less stringent than Southwestern's current C-Conditioning service. Southwestern adds, however, that it will keep its current C-Conditioning service available for those customers presently taking that service.

3. MCI first opposes the new rate structure which Southwestern proposes in Transmittal 1726. MCI Petition at 2. MCI argues that in order for a customer to receive the same service under Southwestern's proposed tariff revisions, that customer must pay over 300 percent more than the existing rates for Southwestern's current C-Conditioning service. *Id.* at 2-5. According to MCI, this pricing is unreasonable because the three new services combined are functionally equivalent to the current C-Conditioning service. MCI further challenges Southwestern's proposal to unbundle IEDD, given the low demand forecasted for that particular service.

4. Southwestern responds that the three new services are not equivalent to its current C-Conditioning service. Southwestern Reply at 3-4. Southwestern explains that the technical specifications of the proposed services differ from its current offering, as well as the packaging of the service. *Id.* at 3-4. Southwestern also asserts that its proposed rates for C-Conditioning are based on its costs. Finally, Southwestern disputes MCI's suggestion that Southwestern should not be allowed to unbundle IEDD because demand is too low, claiming that MCI's suggestion would confuse customers because the industry's current technical standards separate the provisioning of IEDD from the provisioning of IAD. *Id.* at 5-7.

5. The Common Carrier Bureau has reviewed the tariff transmittal, Southwestern's revisions, and the various pleadings. We conclude that no compelling argument has been presented that the tariff proposal is unlawful so as to require rejection and that no question has been presented that warrants investigation at this time.

6. IT IS THEREFORE ORDERED that the petition to reject, or in the alternative to suspend and investigate, filed by MCI Telecommunications Corporation against Southwestern Bell Telephone Company Tariff F.C.C. No. 68, Transmittal No. 1726, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] According to Southwestern, end link parameters are the transmission specifications for the Local Access Transport Area (LATA) access portion of voice grade service. In addition, it explains that these parameters are defined from the interexchange carrier's (IC) point of termination to a customer premises network interface. Southwestern D&J at 1.2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS CO.,
Complainant,

v. File No. E-89-126

SOUTHERN NEW ENGLAND TELEPHONE CO.,
Defendant.

ORDER

Adopted: April 3, 1989; Released: April 14, 1989

By the Acting Chief, Enforcement Division, Common Carrier Bureau:

1. On February 27, 1989, US Sprint Communications Company Limited Partnership (US Sprint) filed a formal complaint against Southern New England Telephone Company (SNET) and other local exchange carriers regarding their refusal to provide a service feature known as CARE Code 02.[1] It alleged that defendants' refusal to implement its request for such service violates the defendants' duty under Section 201(a) of the Communications Act to furnish interstate communication service upon reasonable request and is also an unreasonable practice in violation of Section 202(b) of the Act.

2. By letter filed March 29, 1989, US Sprint advised that SNET has informed that it will provide the service in question under terms that are satisfactory to US Sprint. Accordingly, US Sprint wishes to withdraw its complaint insofar as it was directed against SNET. On the basis of the statements contained in US Sprint's letter, we conclude that there are no longer issues in controversy between the parties to the above-captioned proceeding and that the proceeding should be terminated.

3. Accordingly, IT IS ORDERED, pursuant to the authority delegated in 47 C.F.R. § 0.291, that US Sprint's request to withdraw its complaint insofar as it was directed against SNET IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Acting Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] US Sprint Communications Company Limited Partnership v. Bell Telephone Company of Pennsylvania, et al. File Nos. E-89-111 through E-89-127. In its complaint, US Sprint stated that it wants to use CARE Code 02 as a means of blocking access to its network and terminating the presubscription of an end user to its interexchange service when the end user has failed to pay for services rendered by US Sprint or has otherwise violated the terms of US Sprint's tariff.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

COMMUNICATIONS SATELLITE CORPORATION — CSG-89-009-ML

For Modification of Its Paumalu, Hawaii (KA-25) TTC&M Earth Station Radio License to increase the antenna to 19-meters and to Provide Additional Telemetry, Tracking, Command and monitoring for INTELSAT Satellites Operating in the Pacific Ocean Region (C-FPA-T2)

COMMUNICATIONS SATELLITE CORPORATION — CSG-89-010-P/L

For Authority Pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to Construct and Operate a 6/4 GHz Limited Motion INTELSAT Standard F-3 Nine-meter Antenna at Paumalu, Hawaii in Order to Provide Telemetry, Tracking, Command and Monitoring Services for INTELSAT Satellites Operating in the Pacific Ocean Region (C-LMA-T3)

COMMUNICATIONS SATELLITE CORPORATION — CSG-89-011-P/L

For Authority Pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to Construct and Operate a 6/4 GHz Limited Motion INTELSAT Standard F-3 Nine-meter Antenna at Paumalu, Hawaii in Order to Provide Telemetry, Tracking, Command and Monitoring Services for INTELSAT Satellites Operating in the Pacific Ocean Region (C-LMA-T4)

COMMUNICATIONS SATELLITE CORPORATION — CSG-89-012-P/L

For Authority Pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to Construct and Operate a 6/4 GHz Limited Motion INTELSAT Standard F-3 Nine-meter Antenna at Paumalu, Hawaii in Order to Provide Telemetry, Tracking, Command and Monitoring Services for INTELSAT Satellites Operating in the Pacific Ocean Region (C-LMA-T5)

COMMUNICATIONS SATELLITE CORPORATION — CSG-89-013-P/L

For Authority Pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to Construct and Operate a 6/4 GHz Limited Motion INTELSAT Standard F-3 Nine-meter Antenna at Paumalu, Hawaii in Order to Provide Telemetry, Tracking, Command and Monitoring Services for INTELSAT Satellites Operating in the Pacific Ocean Region (C-LMA-T6)

COMMUNICATIONS SATELLITE CORPORATION — CSG-89-014-P/L

For Authority Pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to Construct and Operate a 6/4 GHz INTELSAT Standard F-3 Nine-meter Antenna at Paumalu, Hawaii in Order to Provide control and coordination data pertaining to Telemetry, Tracking, Command and Monitoring Services for INTELSAT Satellites Operating in the Pacific Ocean Region (C-CCA-T7)

COMMUNICATIONS SATELLITE CORPORATION — CSG-89-015-P/L

For Authority Pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to Construct and Operate a 6/4 GHz INTELSAT Standard F-3 Nine-meter Antenna at Paumalu, Hawaii in Order to Provide control and coordination data pertaining to Telemetry, Tracking, Command and Monitoring Services for INTELSAT

Satellites Operating in the Pacific Ocean Region (C-CCA-T8)

COMMUNICATIONS SATELLITE CORPORATION — CSG-89-016-P/L

For Authority Pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as Amended to Construct and Operate a 6/4 GHz INTELSAT Standard F-3 Nine-meter Antenna at Paumalu, Hawaii in Order to Provide control and coordination data pertaining to Telemetry, Tracking, Command and Monitoring Services for INTELSAT Satellites Operating in the Pacific Ocean Region (C-CCA-T9)

COMMUNICATIONS SATELLITE CORPORATION — CSG-89-017-P/L

For Authority Pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to Construct and Operate a 14/11 GHz INTELSAT Standard C 14.2-meter Antenna at Paumalu, Hawaii in Order to Provide Telemetry, Tracking, Command and Monitoring Services for INTELSAT Satellites Operating in the Pacific Ocean Region (K-FPA-T10)

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: March 31, 1989; Released: April 14, 1989

By the Chief, International Facilities Division:

1. On November 17, 1988, the Communications Satellite Corporation (Comsat) filed the above captioned applications for authority to construct and operate C-band and K-band satellite earth station facilities at its Paumalu, Hawaii site for use in providing telemetry, tracking, command and monitoring (TTC&M) services for operation in the INTELSAT TTC&M network.[1] The applications were placed on public notice on November 23, 1988. No comments were received. We grant the applications for the reasons set forth below.

2. Comsat states that, in September 1987, the INTELSAT Board of Governors approved the issuance of a request for proposal (RFP) to Signatories for the establishment of TTC&M facilities to service INTELSAT from 1990 to 1994. According to Comsat, INTELSAT sought proposals for a Pacific Ocean Region (POR) TTC&M network, consisting of a central hub, using antennas dedicated to TT&C functions.

3. Comsat states it responded to INTELSAT's RFP for a POR TTC&M network with a proposal to upgrade Comsat's current 16.5 meter C-band TTC&M T2 antenna at Paumalu, Hawaii. Comsat states it additionally proposed to construct eight new antennas at Paumalu, employing a U.S. turnkey contractor to construct the station and Comsat employees to operate the proposed facilities. INTELSAT accepted that Comsat's Paumalu TTC&M location represented an optimum site for the INTELSAT POR TTC&M network because it is an existing facility readily capable of expansion to meet INTELSAT's TTC&M requirements, Comsat states. INTELSAT approved Comsat's proposal at its September 1988 Board of Governors meeting.

4. Comsat in its applications, seeks authority to (1) upgrade the existing 16.5-meter Paumalu T2 antenna to a 19-meter INTELSAT Revised Standard A full performance antenna with dual polarization at 6/4 GHz (C-band Full Performance Antenna or T2), (2) construct and operate four INTELSAT Standard F-3 nine-meter earth station antennas equipped for single polarization at 6/4 GHz (C-band Limited Motion Antennas or T3, T4, T5 and T6), (3) construct and operate three INTELSAT Standard F-3 nine-meter earth station antennas equipped for single polarization at 6/4 GHz (C-band Control Coordination Antennas or T7, T8 and T9) and (4) construct and operate an INTELSAT Standard C 14.2-meter full performance earth station antenna with dual polarization operation at 14/11 GHz (K-band Full Performance Antenna or T10). Comsat states that these nine antennas will operate in conjunction with each other and will, in all, comprise the INTELSAT POR TTC&M network.

5. Comsat states the T2 antenna will perform routine TTC&M functions on all INTELSAT POR satellites in its coverage area and will also be utilized for TTC&M of newly launched INTELSAT Spacecraft in transfer orbit. The T2 antenna may be used for in-orbit testing (IOT) functions on operating spacecraft, to reverify spacecraft communications parameters and to investigate any anomalies, Comsat states. In order to perform these functions, Comsat states it will need to make a number of changes to the current T2 antenna. Although the basic structure of the existing 16.5-meter T2 antenna is identical to a 19-meter antenna, work will be undertaken to extend the main reflector support elements, replace and augment the reflector panels to meet the two degree sidelobe requirements, and replace the subreflector and feed, Comsat explains. It adds that significant portions of the radio frequency equipment, *e.g.*, HPA's and LNA's, will be replaced. Comsat states it also plans to refurbish the basic antenna structure and positioning elements, including sandblasting, priming and painting.

6. Comsat states the T3, T4, T5 and T6 identical C-band Limited Motion Antennas will operate in conjunction with each other in the proposed system. Comsat states each of the C-band Limited Motion Antennas at Paumalu will generally be assigned to a specific INTELSAT satellite, working in conjunction with another INTELSAT TTC&M site, to provide two-site tracking and ranging data and for telemetry and commanding purposes. One of the four C-band Limited Motion Antennas will also be assigned to point to up to three satellites to support periodic two-site tracking and ranging data gathering with the oth-

er TTC&M site, Comsat states and adds, TT&C access to each satellite in service is required on a full-time contiguous and highly reliable basis. Comsat explains adequate backup requires two-site visibility to all satellites in service. Since these satellites are maintained in reasonably bounded orbital arcs, modestly sized, C-band Limited Motion Antennas will be a cost-effective way to provide the necessary TTC&M support, Comsat states.

7. According to Comsat, the T7, T8 and T9 identical C-band Control Coordination Antennas will operate in conjunction with each other in the proposed system. Comsat plans to use these antennas to transmit and receive control and coordination data between INTELSAT headquarters in Washington, D.C. and foreign TTC&M and TDMA Reference and Monitoring Service (TRMS) earth stations. The use of these dedicated C-band Control Coordination Antennas for TTC&M and TRMS voice and data lines with redundant paths, will ensure a higher quality of performance than that of the present network, which uses Signatory earth station antennas and often circuitous land-line connections, involving multiple interface and entities, Comsat explains. Comsat anticipates that one of the C-band Control Coordination Antennas will be used to link the ASC-1 domestic satellite with the new INTELSAT TTC&M facility at Clarksburg, Maryland.[2] Comsat states it will pass control and coordination data over this link to and from Clarksburg, and the other two C-band Control Coordination Antennas will access INTELSAT POR satellites for control and coordination data networking for Asian TTC&M and TRMS stations in the INTELSAT TTC&M network.

8. Comsat states the primary operation of the T10 (K-band Full Performance Antenna) will be for K-band communications, monitoring and IOT functions for K-band transponders. It will also provide TT&C launch support for all K-band satellites, Comsat states.

9. According to Comsat, the site on which the earth station complex will be constructed comprises approximately 11 acres of its property in Paumalu, Oahu, Hawaii. Comsat states it plans to construct a new control building with a dedicated power system and HVAC, to be used solely for the TTC&M functions. The TTC&M facility will be configured for full monitor and control of critical units from the station Control Room, Comsat states, and adds, that it plans for some monitoring and control functions to be performed remotely by INTELSAT headquarters at a later date, with the capability in the future to accomplish total remote operation during off-peak hours.

10. According to Comsat, INTELSAT requires that the facility must be operational by May 1, 1990. In order to meet that deadline, the contractor must begin work as soon as all required local permits are obtained, which Comsat estimated would be by December 1988.[3] Comsat reports that the capital cost of the facilities, configured as set out above, including spares, test equipment, and in-house costs, will be approximately $9.5 million. The capital, operating and maintenance costs for this earth station will be paid for by INTELSAT and will not be reflected in any Comsat tariff, Comsat adds.

11. Upon review of the applications, we find Comsat's plan to construct and operate C-band and K-band satellite earth station facilities at its Paumalu, Oahu, Hawaii site for providing TTC&M services for the operation of INTELSAT TTC&M network is operationally sound. The proposed construction will not adversely affect the environment and the antennas will comply with all applicable rules. Comsat has completed frequency coordination for all facilities.

12. Although Comsat proposes to provide TTC&M services in the transmitting frequency band of 5850-5925 MHz and receiving frequency band of 3625-3700 MHz, we will defer our decision on this matter until the frequency coordination with the National Telecommunications and Information Administration (NTIA) is completed.

13. We therefore conclude that it will be in the public interest to allow Comsat to offer TTC&M service to the INTELSAT TTC&M network. This service will allow for the establishment of additional TTC&M facilities to service INTELSAT in the period from 1990 to 1994.

14. Accordingly, IT is ORDERED that the applications of Communications Satellite Corporation, File Nos. CSG-89-009-ML and CSG-89-010, 011, 012, 013, 014, 015, 016 and 017-P/L ARE GRANTED pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4(), 201(c)(6) and 201(c)(7) of the Communications Satellite Act of 1962, as amended, to consist of an earth station complex comprised of the following facilities for the provision of TTC&M services specified in paragraphs 5-8 to INTELSAT:

a) one C-band full performance INTELSAT Revised Standard A earth station with a 19-meter antenna for dual polarization operation in the 6/4 GHz band (C-FPA-T2);

b) four C-band limited motion INTELSAT Standard F-3 earth stations with 9-meter antennas for single polarization in the 6/4 GHz band (C-LMA-T2, T4, T5 and T6);

c) three C-band control coordination INTELSAT Standard F-3 earth stations with 9-meter antennas for single polarization operation in the 6/4 GHz band (C-CCA-T7, T8 and T9); and

d) one K-band full performance INTELSAT Standard C earth station with a 14.2-meter antenna for dual polarization operation in the 14/11 GHz band (K-FPA-T10).

15. It is FURTHER ORDERED that all operations in the extended frequency bands, 5850-5925 MHz and 3625-3700 MHz, are subject to International Footnote 806 and U.S. Footnote 245 in Section 2.106 of the Commission's Rules, CFR Section 2.106 and to final coordination with NTIA. Any conditions or limitations in these bands will be indicated on Comsat's licenses.

16. It is FURTHER ORDERED that Comsat shall provide the Commission with a summary of equipment actually installed before completion of equipment installation and facility activation.

17. It is FURTHER ORDERED that Special Temporary Authority granted to Comsat on December 1, 1988 to begin construction of these facilities is HEREBY TERMINATED.

18. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] The applications were filed under Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), 201(c)(6) and 201(c)(7) of the Communications Satellite Act of 1962, as amended.

[2] Comsat shall file a Modification of License application with Satellite Radio Branch of the Domestic Facilities Division for this authority.

[3] Comsat separately filed Section 319(d) waiver request to enable it to begin construction to meet INTELSAT's servce requirements. The request was granted on December 1, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

COMMUNICATIONS SATELLITE CORPORATION — CSG-88-091-P/L

For Authority Pursuant to Title III of the Communications Act of 1934, as amended, to Construct and Operate a 19-meter C-band Full Performance INTELSAT Revised Standard A Satellite Earth Station Facility in Clarksburg, Maryland in Order to Provide Telemetry, Tracking, Command and Monitoring Services and In-Orbit Testing for INTELSAT Satellites Operating in the Atlantic Ocean Region (C-FPA)

COMMUNICATIONS SATELLITE CORPORATION — CSG-88-092-P/L

For Authority Pursuant to Title III of the Communications Act of 1934, as amended, to Construct and Operate a 14.2-meter K-band Full Performance INTELSAT Standard C Satellite Earth Station Facility in Clarksburg, Maryland in Order to Provide Telemetry, Tracking, Command and Monitoring Services and In-Orbit Testing for INTELSAT Satellites Operating in the Atlantic Ocean Region (K-FPA)

COMMUNICATIONS SATELLITE CORPORATION — CSG-88-093-P/L

For Authority Pursuant to Title III of the Communications Act of 1934, as amended, to Construct and Operate a 9-meter C-band Limited Motion INTELSAT Standard F-3 Satellite Earth Station Facility in Clarksburg, Maryland in Order to Provide Telemetry, Tracking, and Command Services for INTELSAT Satellites Operating in the Atlantic Ocean Region (C-LMA-1)

COMMUNICATIONS SATELLITE CORPORATION — CSG-88-094-P/L

For Authority Pursuant to Title III of the Communications Act of 1934, as amended, to Construct and Operate a 9-meter C-band Limited Motion INTELSAT Standard F-3 Satellite Earth Station Facility in Clarksburg, Maryland in Order to Provide Telemetry, Tracking, and Command Services for INTELSAT Satellites Operating in the Atlantic Ocean Region (C-LMA-2)

COMMUNICATIONS SATELLITE CORPORATION — CSG-88-095-P/L

For Authority Pursuant to Title III of the Communications Act of 1934, as amended, to Construct and Operate a 15.2-meter C-band Limited Motion INTELSAT Revised Standard A Satellite Earth Station Facility in Clarksburg, Maryland in Order to Provide Telemetry, Tracking, and Command; TDMA Reference and Monitoring; and Communications Systems Monitoring Services for INTELSAT Satellites Operating in the Atlantic Ocean Region (C-TRMS/CSM LMA-1)

COMMUNICATIONS SATELLITE CORPORATION — CSG-88-096-P/L

For Authority Pursuant to Title III of the Communications Act of 1934, as amended, to Construct and Operate a 15.2-meter C-band Limited Motion INTELSAT Revised Standard A Satellite Earth Station Facility in Clarksburg, Maryland in Order to Provide Telemetry, Tracking, and Command; TDMA Reference and Monitoring; and Communications Systems Monitoring Services for INTELSAT Satellites Operating in the Atlantic Ocean Region (C-TRMS/CSM LMA-2)

COMMUNICATIONS SATELLITE CORPORATION — CSG-88-097-P/L

For Authority Pursuant to Title III of the Communications Act of 1934, as amended, to Construct and Operate a 9-meter C-band INTELSAT Standard F-3 Satellite Earth Station Facility in Clarksburg, Maryland in Order to Provide Control and Coordination Data Pertaining to Telemetry, Tracking, Command and Monitoring Services for INTELSAT Satellites Operating in the Atlantic Ocean Region (C-CCA-1)

COMMUNICATIONS SATELLITE CORPORATION — CSG-88-098-P/L

For Authority Pursuant to Title III of the Communications Act of 1934, as amended, to Construct and Operate a 9-meter C-band INTELSAT Standard F-3 Satellite Earth Station Facility in Clarksburg, Maryland in Order to Provide Control and Coordination Data Pertaining to Telemetry, Tracking, Command and Monitoring Services for INTELSAT Satellites Operating in the Atlantic Ocean Region (C-CCA-2)

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: March 31, 1989; Released: April 14, 1989

By the Chief, International Facilities Division:

1. On September 22, 1988, the Communications Satellite Corporation (Comsat) filed the above-captioned applications requesting authority to construct and operate seven C-band and one K-band satellite earth station facilities at its Clarksburg, Maryland site for use in providing telemetry, tracking, command and monitoring (TTC&M) services for operation in the INTELSAT TTC&M network.[1] The applications were placed on public notice on September 28, 1988.[2] No comments were received. We grant the applications for the reasons set forth below.

BACKGROUND

2. Comsat states that, in September 1987, the INTELSAT Board of Governors approved the issuance of a request for proposal (RFP) to Signatories for the establishment of TTC&M facilities to service INTELSAT from 1990 to 1994. According to Comsat, the TTC&M network concept approved by the Board of Governors consists of six regional earth station facilities utilizing antennas dedicated to the tracking, telemetry and control (TT&C) function, with the use of colocated communications antennas, if applicable, for monitoring and/or control and coordination circuits only. The current network utilizes eight TTC&M stations, and two Communications Systems Monitoring (CSM) stations, Comsat explains.

3. Comsat states the Board of Governors was informed by the INTELSAT Executive Organ of the advantages of a Washington, D.C. area TTC&M facility, because it could function as a backup to the satellite Control Center at INTELSAT headquarters, a convenient and easily accessible in-orbit testing (IOT) facility and a hub for the Control and Coordination network required for operational data transfer between INTELSAT headquarters and the outlying TTC&M and Time Division Multiple Access (TDMA) Reference and Monitoring Service (TRMS) stations worldwide.

4. Comsat states it responded to the INTELSAT RFP with a proposal to provide earth station facilities and services in Region 1A (East Coast of North America) and Region 5 (Pacific Ocean Region (POR)). Comsat explains it determined that its Clarksburg, Maryland location presented an optimum site for service in Region 1A, in that it could be linked to INTELSAT headquarters via one microwave hop and fiber cable, with backup telephone facilities. Further, Comsat notes that the Clarksburg complex is an existing facility fully capable of accommodating earth stations of the magnitude proposed. Comsat states it proposed to construct the facility at Clarksburg, using a U.S. turnkey contractor chosen through competitive bidding. INTELSAT approved Comsat's proposal at its September 1988 Board of Governors' meeting, Comsat reports. In addition to performing TTC&M functions, Comsat states the facility will be used to perform IOT functions, and will also be configured to provide TRMS/CSM in the INTELSAT network, which services are currently being performed by Comsat via facilities located at the ATT-C earth station at Etam, West Virginia.

5. According to Comsat, the earth station complex will be utilized in the following manner:

(a) The C-FPA will perform routine TTC&M functions on all INTELSAT Atlantic Ocean Region (AOR) spacecraft in its coverage area, and will also be utilized for TT&C of newly launched INTELSAT spacecraft in transfer orbit. Following apogee motor firing, the C-FPA may be utilized in the performance of IOT. IOT functions will also be required on operating spacecraft to reverify spacecraft communications parameters and in the investigation of anomalies;

(b) The K-FPA will serve the same functions as the C-FPA, except that it will not be normally required for TT&C to INTELSAT satellites. Thus, it will be utilized for communications monitoring and IOT functions in the K-band transponders;

(c) The C-LMAs will be utilized for TT&C functions solely. They are normally assigned to a particular satellite, for track and range data, telemetry and commanding. One of the two LMAs will be assigned to point to up to three spacecraft periodically to support two-site tracking and ranging data gathering;

(d) The C-TRMS/CSM LMAs will be dedicated to the 335.5 degree and 342 degree East Longitude spacecraft to perform TRMS, CSM and TT&C functions continuously. These antennas are larger than a normal LMA, due to the downlink performance (G/T) and effective radiated isotropic power (e.i.r.p) requirements of the TRMS and CSM reference stations; and

(e) The C-band CCAs will be used to transmit and receive control and coordination data between INTELSAT headquarters and other U.S. and foreign TTC&M and TRMS earth stations. It is anticipated that one CCA will access the ASC-1 domestic satellite to the TTC&M facility at Paumalu, Hawaii.[3] Control and coordination data will be passed over this link to Paumalu and beyond to TTC&M facilities in Asia via INTELSAT spacecraft. The other CCA will access an AOR INTELSAT spacecraft for control and coordination data networking to European TTC&M stations.

6. Comsat states the earth station complex site will be constructed on approximately 10 acres of the existing Comsat property in Clarksburg, Montgomery County, Maryland. According to Comsat, this site is an excellent compromise between proximity to INTELSAT Headquarters in Washington, D.C. and freedom from radio frequency interference. Comsat anticipates the site will be linked to INTELSAT via a two-GHz microwave link between Clarksburg and the GBS Building in Rockville, Maryland, and a leased fiber optic link from the GBS Building to INTELSAT. Redundant facilities may also be implemented via a leased telephone line, Comsat states. Comsat adds the TTC&M facility will be configured for full monitor and control (M&C) of critical units from the station Control Room. Comsat also envisions that some M&C functions will be performed remotely by INTELSAT Headquarters at a later date, with the capability in the future to accomplish total remote operation during off-peak hours.

7. Comsat notes that INTELSAT requires the facility be operational by May 1, 1990. Comsat reports that the capital cost of the facilities, configured as set out above, including spares, test equipment, and in-house costs, will be approximately $12 million. The capital, operating and maintenance costs for this earth station will be paid for by INTELSAT and will not be reflected in any Comsat tariff, Comsat adds.

DISCUSSION

8. Upon review of the applications, we find Comsat's plan to construct and operate seven C-band and one K-band satellite earth station facilities at its Clarksburg, Maryland site for providing TTC&M services for the operation of INTELSAT's TTC&M network is operationally sound. The proposed construction will not adversely affect the environment and the antennas will comply with all applicable rules. Frequency coordination has been completed except for the following bands: 5989.5-6019.5 MHz, 6048.8-6078.8 MHz, 6093.28-6123.28 MHz, 6137.75-6167.75 MHz and 6182.24- 6419.79 MHz.[4]

9. Although Comsat proposes to provide TTC&M services in the transmitting frequency band of 5850-5925 MHz and receiving frequency band of 3625-3700 MHz, we will defer our decision on this matter until the frequency coordination with the National Telecommunications and Information Administration (NTIA) is completed.

10. We therefore conclude that it will be in the public interest to allow Comsat to offer TTC&M service to the INTELSAT TTC&M network. This service will allow for the establishment of additional TTC&M facilities to service INTELSAT in the period from 1990 to 1994.

11. Accordingly, IT IS ORDERED that the applications of the Communications Satellite Corporation to construct and operate TTC&M facilities at Clarksburg, Maryland, File Nos. CSG-88-091, 092, 093, 094, 095, 096, 097 and 098-P/L ARE GRANTED pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), 201(c)(6) and 201(c)(7) of the Communications Satellite Act of 1962, as amended, to consist of an earth station complex comprised of the following facilities for the provision of TTC&M services specified in paragraph 5 to INTELSAT:

a) one C-band full performance INTELSAT Revised Standard A earth station with a 19-meter antenna for dual polarization operation in the 6/4 GHz band (C-FPA);

b) one K-band full performance INTELSAT Standard C earth station with a 14.2-meter antenna for dual polarization operation in the 14/11 GHz band (K-FPA);

c) two C-band limited motion INTELSAT Standard F-3 earth stations with 9-meter antennas for single polarization in the 6/4 GHz band (C-LMA);

d) two C-band TRMS/CSM limited motion INTELSAT Revised Standard A earth stations with 15.2-meter antennas for dual polarization operation in the 6/4 GHz band (C-TRMS/CSM LMA); and

e) two C-band control coordination INTELSAT Standard F-3 earth stations with 9-meter antennas for single polarization operation in the 6/4 GHz band (C-CCA).

12. It is FURTHER ORDERED that Comsat shall not operate any antennas on the following frequency bands: 5989.5-6019.5 MHz; 6048.8-6078.8 MHz; 6093.28-6123.28 MHz; 6137.75-6167.75 MHz; and 6182.24-6419.79 MHz.

13. It is FURTHER ORDERED that all operations in the extended frequency bands, 5850-5925 MHz and 3625-3700 MHz, are subject to International Footnote 806 and U.S. Footnote 245 in Section 2.106 of the Commission's Rules, CFR Section 2.106 and to final coordination with NTIA. Any conditions or limitations in these bands will be indicated on Comsat's licenses.

14. It is FURTHER ORDERED that Comsat shall provide the Commission with a summary of equipment actually installed before completion of equipment installation and facility activation.

15. It is FURTHER ORDERED that Special Temporary Authority granted to Comsat on October 21, 1988 to begin construction of these facilities is HEREBY TERMINATED.

16. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] The applications were filed under Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), 201(c)(6) and 201(c)(7) of the Communications Satellite Act of 1962, as amended.

[2] On October 21, 1988, Comsat was granted Special Temporary Authority to begin construction of these facilities.

[3] To receive authorization to offer this service on the appropriate antenna(s), Comsat shall file a modification of license with the Satellite Radio Branch of the Domestic Facilities Division.

[4] Several frequency interference cases have not been resolved with American Satellite Company (WLM574) at Paris East, Virginia and AT&T Communications Eastern Region (WAD26) at Wye Mills, Maryland.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CRESCOMM TRANSMISSION SERVICES, INC. CSG-89-018-ML

For authority to modify a seven-meter Ku-band transmit/receive earth station (call sign E860029) at Holmdel, New Jersey) for the provision of service between the United States and those countries to which) PAS is authorized to serve

PROFESSIONAL VIDEO TRANSMISSION SERVICES CORPORATION CSG-89-037-ML

For authority to modify a five-meter Ku-band transmit/receive earth station (call sign E890197) at Washington, D.C. for the provision of service to Canada via U.S. domestic satellites and ANIK, and to Europe via PAS

SIMMONS SATELLITE, LTD d/b/a BONNEVILLE SATELLITE COMMUNICATIONS CSG-89-039-ML

For authority to modify a five-meter Ku-band transmit/receive earth station (call sign E890204) at San Diego, California for the provision of service between the United States and those points which PAS is authorized to serve, and to points in Canada and Latin America via U.S. domestic satellites, ANIK and Morelos

E.D.S. SPECTRUM CORPORATION CSG-89-043-ML

For modification of its seven-meter, Ku-band domestic fixed earth station (call sign E880059) at Plano, Texas, for the provision of non-common carrier international communications between the United States and those points to which PAS is authorized to serve

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: March 31, 1989; Released: April 14, 1989

By the Chief, International Facilities Division:

1. The Commission had under consideration the above-captioned applications requesting authority under Title III of the Communications Act of 1934, as amended, to modify existing domestic licenses to provide transborder services between the United States and Canada, Mexico, Latin America, and the Caribbean; and to communicate with the PAS-1 satellite to provide service between the United States and points to which Alpha Lyracom (d/b/a Pan American Satellite (PAS)) has been authorized to serve. These applications were placed on the Commission's public notice. The Communications Satellite Corporation (Comsat) filed comments in response to the application of Professional Video Transmission Services Corporation.

THEAPPLICATIONS

2. *Crescomm Transmission Services, Inc (CTS) (File No. CSG-89-018-ML).* CTS requests authority to modify a seven-meter Ku-band transmit/receive fixed domestic earth station (E860029) for the provision of international television and a related audio transmission between Holmdel, New Jersey and those international points PAS has been authorized to serve.[1] CTS proposes to receive, on an occasional use basis, a domestic satellite C-band signal at its Holmdel earth station facility, to provide a "turn-around" service whereby the received signal will be converted to Ku-band, and then uplinked via the Holmdel earth station to the PAS-1 satellite. CTS will use Galaxy-1, Galaxy-3 and other appropriate domestic satellites as the originating satellites. CTS states that the requested modification of authorization will allow it to provide needed services on PAS-1, thereby increasing the utilization of the satellite.

3. *Professional Video Transmission Services Corporation (PVTS) (File No. CSG-89-037-ML).* PVTS requests authority to modify its five-meter Ku-band fixed transmit/receive earth station (E890197) at Washington, D.C. for the provision of transborder service between the U.S. and Canada via all U.S. domestic satellite systems and Canada's ANIK satellite system. PVTS also requests authority to use this earth station to provide services between Washington, D.C. and those points which PAS has been authorized to serve via the PAS-1 satellite. On February 13, 1989, in response to PVTS' application, Comsat states that it has no objection to the grant of the application to provide transborder service so long as PVTS makes the requisite showing that INTELSAT cannot provide the proposed services, or cannot do so practically and economically. Comsat notes that PVTS has not indicated what transborder services it intends to offer. On March 29, 1989, PVTS filed an amendment which states that it will provide occasional use video and associated operational communications services to Canada on an incidental basis.

4. *Simmons Satellite, Ltd, d/b/a Bonneville Satellite Communications (Simmons) (File No. CSG-89-039-ML).* Simmons requests authority for modification of its license for a five-meter Ku-band domestic fixed transmit/receive

earth station (call sign E890204) at San Diego, California to communicate with the ANIK and Morelos systems and all U.S. domestic satellite systems for the provision of various video programming to cable companies and broadcasters in transborder locations. Simmons also requests authority to use its San Diego earth station to access the PAS-1 satellite. On March 15, 1989, Simmons filed a supplement to its application indicating that service via the PAS-1 satellite would be provided only to those countries to which PAS is authorized to serve.[2]

5. *E. D. S. Spectrum Corporation (EDS) (File No. CSG-89-043-ML).* EDS, a wholly-owned subsidiary of Electronic Data Systems Corporation, which is in turn a wholly-owned subsidiary of General Motors Corporation, requests authority to modify its existing license for a seven-meter Ku-band earth station at Plano, Texas, (File No. 00108-DSE-P/L-88, call sign 880059) to permit it to access the PAS-1 satellite for private, non-common carrier international communications, not interconnected with the public-switched message networks, between the U.S. and those countries which PAS is authorized to serve. In a supplement to its application filed on March 7, 1989, EDS states that its use of the PAS system will be under a one-year contract for a minimum of 91 hours of occasional use video space segment service (and of incidental data carriers). EDS adds that grant of the requested modification will permit it to take advantage of the long-term, private, international, non-switched communications services offered via the PAS system.

DISCUSSION

6. Upon review of the PVTS and Simmons applications, we find that they are consistent with the Commission's Transborder policy which permits the use of domestic satellites to provide certain international public telecommunications services. These applications are similar to those applications previously authorized by the Commission.[3] Simmons has previously received Section 214 authorization to provide transborder services between the U.S. and Mexico and Canada using U.S. domestic satellites and the Mexican Morelos and Canadian ANIK satellite systems.[4] The subject earth station modification application will permit Simmons to more fully implement the Section 214 authority it now has for transborder services. PVTS' application is also consistent with the Commission's Transborder Policy and previous authorizations. PVTS states that its services will consist of video occasional use services transmitted throughout the U.S. which will be received in transborder locations on an incidental basis. PVTS also states that it will provide associated operational communications in connection with the occasional use video service. The Commission has recognized that where the incidental reception of a signal in transborder locations is involved, use of the INTELSAT system would be uneconomical and impractical. In view of these circumstances, we find that the public interest would be served by the grant of the subject applications. We must note, however, that not all U.S. domestic satellites have been consulted under Article XIV(d) of the INTELSAT Agreement for transborder services. Thus, the grant of final authority for both the satellites and services requested in the subject applications is conditioned on compliance with Attachments 1 and 2.

7. We also find that the applications of CTS, PVTS, Simmons and EDS to utilize Ku-band space segment capacity via the PAS-1 satellite to provide private, non-common carrier service to those points in Europe which PAS has been authorized to serve are consistent with the Commission's *Separate System* decision.[5] On October 28, 1988, PAS was authorized to operate the six Ku-band transponders in its PAS-1 satellite for communications between the United States and the United Kingdom, Ireland, the Federal Republic of Germany, Sweden and Luxembourg subject to certain restrictions.[6] In view of the foregoing, we conclude that the grant of these applications is consisted with Commission's Separate satellite Systems policy and will serve the public interest.

8. Accordingly, IT IS ORDERED that the applications of CTS (File No. CSG-89-018-ML), PVTS (File No. CSG-89-037-ML), Simmons (File No. CSG-89-039-ML), and EDS (File No. CSG-89-043-ML) ARE GRANTED, and

a. PVTS and Simmons are authorized to use the subject earth stations to provide the transborder services requested in their applications consistent with Attachments 1 and 2; and

b. CTS, PVTS, Simmons and EDS are authorized to access the space segment capacity via the PAS-1 satellite to provide private, non-common carrier services between the U.S. and the United Kingdom, Ireland, the Federal Republic of Germany, Luxembourg, Sweden and those additional points which the PAS- 1 satellite may be authorized in the future to serve upon notice from the Department of State that the United States has fulfilled its obligations to consult with INTELSAT under Article XIV(d).

9. IT IS FURTHER ORDERED that the operation of the subject earth stations communicating with PAS-1 satellite is restricted to the provision of capacity through the sale or long-term lease (of at least one year) of transponder capacity for communications not interconnected with the public-switched message networks (except for emergency restoration service).

10. IT IS FURTHER ORDERED that the Commission will retain jurisdiction over the use of all space segment within the PAS system and operation of the proposed earth stations to ensure compliance with the restrictions stated.

11. IT IS FURTHER ORDERED that authority granted herein to CTS, PVTS, Simmons and EDS is specifically conditioned on the operation of the proposed earth stations in accordance with the parameters summarized and conditions described in Attachment No. 1 to AP-11-10E, "Report by the Board of Governors to the Eleventh Assembly of Parties Pursuant to Article XIV(d) on the PanAmSat Network" (February 1987).

12. IT IS FURTHER ORDERED that Special Temporary Authorities (CSG-89-018-ML-T-1 and CSG-89-039-ML-T-1) granted to CTS and Simmons respectively are HEREBY TERMINATED.

13. This authorization constitutes the final step with respect to the provision of transborder services only insofar as the U.S. regulatory process is concerned. It does not, however, dispense with any requirements that may be imposed by other countries involved.

14. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained.

15. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

ATTACHMENT 1

U. S. Satellites Consulted Pursuant to Article XIV (d)

Satellites

*FEDEX A
*FEDEX B
GALAXY I
*GALAXY II
GALAXY III
*GALAXY IV
*GALAXY B
GSTAR I
GSTAR II
*GSTAR III
*COMSTAR III
COMSTAR D-4
*COMSAT GEN B
SPACENET I
*SPACENET II
SPACENET III
SATCOM IR
*SATCOM IIR
SATCOM IIIR
SATCOM IV
SATCOM V
SATCOM K-1
*SATCOM K-2
SBS V
SBS I
SBS II
SBS III
**SBS IV
TELSTAR 3A
TELSTAR 302
*TELSTAR 303
CONTEL ASC-I
CONTEL ASC-II
WESTAR IV
WESTAR V
*WESTAR B
*WESTAR (79' W)

* Consulted for Latin America/Caribbean services only. Includes receive-only video programming from the U.S. to Mexico.

** Consulted for Canada and Latin America/Caribbean services only.

ATTACHMENT 2

SUMMARY OF INTELSAT CONSULTATION

Country	Service[s]	Satellite [s]
Anguilla	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Antigua and Barbuda	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bahamas	T.V., audio and data receive-only	all satellites listed in Attachment 1
Barbados	T.V. receive-only	all Galaxy, Satcom and Westar satellites listed in Attachment 1
Belize	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bermuda	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
British Virgin Islands	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Canada	occasional pt.-to-pt. and full time video services and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus ANIK B, C1, C2, C3, D1 and D2
Cayman Islands	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Colombia	T.V. receive-only	Galaxy I and III, Satcom IR, IIIR, IV and V, Westar IV, Westar V and Westar (269E)
Costa Rica	T.V. receive-only listed in	all satellites Attachment 1
Dominica T.V.,	audio and data receive-only	all satellites listed in

		Attachment 1
Dominican Republic receive-only	T.V., audio and data listed in	all satellites Attachment 1
El Salvador	T.V. receive-only	all satellites listed in Attachment 1
Grenada	T.V., audio and data receive-only	all satellites listed in Attachment 1
Guatemala	T.V. and audio receive-only	all satellites listed in Attachment 1
Haiti receive-only	T.V., audio and data	all satellites listed in Attachment 1
Honduras	T.V. receive-only	all satellites listed in Attachment 1
Jamaica receive-only	T.V., audio and data (See note 3)	all satellites listed in Attachment 1
Mexico	Full-time and occasional T.V. services, receive-only audio and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus the Morelos I and II satellites
Monsterrat	T.V., and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Netherlands Antilles	T.V. receive-only	Galaxy I, Satcom III-R and IV, Westar IV and V and Comstar D4
Panama	T.V., audio and data receive-only	all satellites listed in Attachment 1
St. Christopher-Nevis	T.V., audio and data receive-only	all satellites listed in Attachment 1
St. Lucia	T.V., audio and data receive-only	all satellites listed in Attachment 1
St. Vincent and the Grenadines	T.V., audio and data receive-only	all satellites listed in Attachment 1
Trinidad and Tobago	T.V. receive-only	all Galaxy, Satcom, Westar and Comstar satellites listed in Attachment 1
Turks & Caicos	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Venezuela	T.V. receive-only	all satellites listed in Attachment 1

Notes

1) With the exception of Mexico and Canada, which were consulted separately, all services (*i.e.* T.V., audio and data receive-only) can be provided to any point over any of the satellites listed in Attachment 1 even through only certain services and satellites were initially requested. This can be accomplished through notifying INTELSAT with no additional consultation required.

2) Attachment 1 contains only those satellites that have been technically consulted with INTELSAT.

3) All services authorized to Latin American/Caribbean locations are receive-only (*i.e.* can be received as a by-product of or incidental to U.S. domestic transmissions).

FOOTNOTES

[1] On November 3, 1988, CTS received Special Temporary Authority (TAO-1469) to operate a transportable earth station for uplink television and related audio transmissions via PAS-1 to British Telecom, International, London Teleport facilities in the United Kingdom. This authority was effective through February 1, 1989, and was extended to April 3, 1989 by our letter of January 31, 1989. A modification of Temporary Authority was granted on March 9, 1989, but not beyond September 5, 1989, to replace the transportable antenna with the 7-meter earth station requested herein.

[2] On March 23, 1989, Simmons received Special Temporary Authority (CSG-89-039-ML-T-1) effective from March 25 through June 23, 1989, to operate the 5-meter earth station via PAS-1 to provide uplink television and related audio transmissions to the United Kingdom and the Federal Republic of Germany.

[3] *See* Transborder Satellite Video Services, 88 FCC 2d 258 (1981). For a more compelte list of the Commission's transborder decisions, *see* note 5 in Overseas Telecommunications, Inc., *et al*, 2 FCC Rcd 5438 (1987).

[4] Simmons Satellite, Ltd, *et. al.*, 4 FCC Rcd 820 (1989).

[5] 100 FCC 2d 1046 (1985), *recon.* FCC 86-144, April 17, 1986, *further recon.* 1 FCC Rcd 439 (1986).

[6] *See* 3 FCC Rcd 6474 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v. File No. E-87-67

PACIFIC BELL
Defendant.

ORDER

Adopted: April 4, 1989; Released: April 14, 1989

By the Acting Chief, Enforcement Division, Common Carrier Bureau:

1. On June 30, 1987, AT&T Communications (AT&T) filed a formal complaint against Pacific Bell. The complaint alleged certain statutory and tariff violations associated with defendant's billing and collection rates for the period July 1, 1985, to December 31, 1986.

2. The parties have conducted discussions, including consultations with members of the Enforcement Division, aimed at settling the complaint. A mutually agreeable settlement of all pending controversies between the parties was reached. On February 8, 1989, counsel for AT&T and Pacific Bell filed a joint motion seeking dismissal of the complaint with prejudice and authorization of their settlement agreement. We are satisfied that dismissal of this complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the proposed settlement agreement of the parties IS AUTHORIZED.

4. IT IS FURTHER ORDERED that the joint motion to dismiss the above-referenced complaint IS GRANTED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Acting Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v.

ILLINOIS BELL TELEPHONE COMPANY, File Nos. E-87-69

INDIANA BELL TELEPHONE COMPANY, INC., E-87-72

MICHIGAN BELL TELEPHONE COMPANY, E-87-73

THE OHIO BELL TELEPHONE COMPANY, E-87-74

WISCONSIN BELL, INC., E-87-75
Defendants.

ORDER

Adopted: April 4, 1989; Released: April 14, 1989

By the Acting Chief, Enforcement Division, Common Carrier Bureau:

1. On June 30, 1987, AT&T Communications (AT&T) filed formal complaints against the Ameritech telephone companies identified above. The complaints alleged certain statutory and tariff violations associated with defendants' billing and collection rates for the period July 1, 1985, to December 31, 1986.

2. The parties have conducted discussions, including consultations with members of the Enforcement Division, aimed at settling the complaints. A mutually agreeable settlement of all pending controversies between the parties was reached. On February 8, 1989, counsel for AT&T and the Ameritech companies filed a joint motion seeking dismissal of the complaints with prejudice and authorization of their settlement agreement. We are satisfied that dismissal of these complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the proposed settlement agreement of the parties IS AUTHORIZED.

4. IT IS FURTHER ORDERED that the joint motion to dismiss the above-referenced complaints IS GRANTED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Acting Chief, Enforcement Division
Common Carrier Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 14, 1989

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON AT & T'S COMPARABLY EFFICIENT INTERCONNECTION PLAN FOR ENHANCED SERVICES COMPLEX

March 30, 1989, the American Telephone and Telegraph Company (AT&T) filed a comparably efficient interconnection (CEI) plan for an enhanced services complex (ESC). According to AT&T, the ESC is an enhanced service architecture that will allow AT&T to offer various voice and data enhanced services. These services will use the equipment located at AT&T's central offices. AT&T states that the ESC, when collocated, will be comprised of a variety of unregulated equipment, such as digital switching equipment, voice response units, application processors and host gateway processors. AT&T initially will use the ESC to offer interactive voice services that enable end users to receive and manipulate audio information stored in the ESC. AT&T states that in the future the ESC will also provide enhanced data services.

According to AT&T, the tariffed basic services that underlie the ESC are AT&T's MEGACOM Service, AT&T MEGACOM 800 Service, ACCUNET T1.5 Service, and ACCUNET Switched 56 Service. AT&T states that it will account for the joint and common costs of ESC pursuant to its Part 32 cost allocation manual that the Commission has approved (2 FCC Rcd 1298 (1987), *recon.*, 2 FCC Rcd 6283 (1987)). AT&T also describes its plans for complying with the other Computer III nonstructural safeguards governing the use of customer proprietary network information, nondiscrimination reporting and nondiscriminatory provisioning, and disclosure of network information.

As required in the Computer III proceeding (*Phase I Order*, 104 FCC 2d 958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *further reconsideration*, 3 FCC Rcd 1135 (1988)), the Commission must approve the CEI plan before AT&T can begin implementing the proposed service.

Interested parties should file comments on this plan by **May 5, 1989** and reply comments by **May 19, 1989,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of AT&T's plan can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE NEW YORK CITY
HUMAN RESOURCES
ADMINISTRATION
Complainant,

v. File No. E-88-115

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY
Defendant.

ORDER

Adopted: April 7, 1989; Released: April 14, 1989

By the Acting Chief, Enforcement Division, Common Carrier Bureau:

1. On August 23, 1988, New York City Human Resources Administration (HRA) filed the above-referenced formal complaint against American Telephone and Telegraph Company (AT&T). HRA alleged that AT&T was illegally requiring payment for telephone charges arising from unauthorized and fraudulent calls made from HRA's PBX system in violation of Sections 201(b) and 202(a) of the Communications Act, 47 U.S.C. §§ 201(b), 202(a).

2. AT&T filed its answer on September 23, 1988, stating that its tariffs reasonably require payment for all long distance calls originating from the customer's telephone number. By letter dated January 23, 1989 from HRA to the Bureau, HRA requested permission to withdraw its complaint and stated that the matter could best be resolved without litigation. HRA further declared that it did not wish to pursue the subject complaint because HRA lacked relevant information which, at the present time, remains confidential and unavailable to it due to a pending related criminal investigation. AT&T responded that the Commission should either resolve the complaint, or dismiss the complaint with prejudice. We requested further briefing from the parties on the issue whether HRA should be allowed to withdraw its complaint without prejudice.

3. In its brief, AT&T asserts, *inter alia*, that HRA's motion to withdraw fails to comply with the requirements of Section 1.727 of the Commission's rules, 47 C.F.R. § 1.727. AT&T argues that it has been prejudiced because it has been required to respond without receiving prior notice of the grounds and authority upon which HRA bases its request to withdraw. AT&T's argument that HRA has not adequately set forth its grounds and legal authority in support of its request is mitigated both by HRA's letter dated January 23, 1989 and by its February 17, 1989 Memorandum of Law in Support of Plaintiff's Withdrawal of Complaint Without Prejudice. Therefore, we find the motion, with supporting documentation, to be in substantial compliance with Section 1.727.

4. AT&T further speculates that if it commenced a court action against HRA to collect the charges at issue, HRA might seek to stay that proceeding in order to recommence a proceeding before the Commission. However, HRA has represented in its pleadings filed with the Bureau that HRA has no intention of seeking such a stay.

5. In any event, HRA's future plans are irrelevant. This complaint is a dispute between two individual parties, and we can find no useful public purpose to be served by declining to dismiss when the complainant unequivocally states that it no longer wishes to prosecute. Moreover, it is well established that a defendant must suffer some plain legal prejudice other than the mere prospect of a second lawsuit to defeat a plaintiff's motion to dismiss without prejudice. *Conafay v. Wyeth Laboratories*, 841 F.2d 417, 419 (D.C. Cir. 1988), *Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143, 145 (9th Cir. 1982). AT&T has not demonstrated that it will be prejudiced in this manner by HRA's withdrawal of its complaint.

6. Accordingly, IT IS ORDERED, pursuant to authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the complaint filed by New York City Human Resources Administration IS DISMISSED without prejudice and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Acting Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 82-243

In the Matter of

Amendment of Parts 1, 21, 22, 74,
and 94 of the Commission's Rules to
Establish Service and Technical
Rules for Government and
non-Government Fixed Service
Usage of the Frequency Bands
932-935 MHz and 941-944 MHz.

ERRATUM

Released: April 17, 1989

The Commission's *Second Report and Order*, FCC 89-45, released February 28, 1989, is corrected as follows:

1) In paragraph 39, the effective date is changed to April 12, 1989.

2) In Appendix B, the last sentence in the NOTE under the listing of paired frequencies is corrected to read: "Single channel use will be permitted only upon a showing that spectrum efficiency will not be impaired and that unpaired spectrum is not available in other bands."

3) In Appendix C, under PART 21, paragraph 2 is corrected to read: "In Section 21.27, paragraph (d) is added as follows:" Correspondingly, the number of the paragraph in Section 21.27 is changed from (b)(2) to (d).

4) In Appendix C, under PART 21, paragraph 4 is corrected to read: "In Section 21.101, the table in paragraph (a) is amended by deleting the frequency range 512 to 1,000 MHz, and by adding the following frequency ranges in numeric order to read as follows:"

5) In Appendix C, under PART 21, paragraph 5 is corrected to read: "In Section 21.107, the table in paragraph (b) is amended by adding the following frequency ranges in numeric order to read as follows:"

Section 21.107 Transmitter Power

* * * * *

(b) * * *

Frequency Band (MHz)	Maximum Allowable Transmitter Power		Maximum Allowable EIRP	
	Fixed (W)	Mobile(W)	Fixed (dBW)	Mobile (dBW)
932.5 to 935	20.0	.....	+40	.....
941.5 to 944	20.0	.....	+40	.....

* * * * *

6) In Appendix C, under PART 22, the paragraph reference in paragraph 3 is corrected from (f) to (g). Correspondingly, the number of the paragraph in Section 22.31 is changed from (f) to (g).

7) In Appendix C, under PART 74, paragraph 2 is corrected to read: "In Section 74.502, a new paragraph (a) is added, former paragraphs (a) through (d) are redesignated as paragraphs (b) through (e), and the paragraph reference in newly redesignated paragraph (e) is changed from (a) to (b)."

8) In Appendix C, under PART 94, the number of the footnote key-ins and footnotes in paragraph 2 are changed as follows: (30) is changed to (32), (31) is changed to (33), and (32) is changed to (34).

With the exception of the second, fourth, and fifth corrections, the item has been corrected for publication in the *FCC Record*, and with the exception of the first, fourth, fifth, and seventh corrections, the item was published correctly in the Federal Register on March 13, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTERN UNION INTERNATIONAL, INC.
Complainant,

v. File Nos. TS-1-79
E-80-38

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, PACIFIC BELL AND SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,
Defendants.

ORDER

Adopted: April 6, 1989; Released: April 17, 1989

By the Acting Chief, Enforcement Division, Common Carrier Bureau:

1. We have before us a joint motion filed on March 31, 1989, by Western Union International, Inc. (WUI), American Telephone and Telegraph Company (AT&T), Pacific Bell, and Southern Bell Telephone and Telegraph Company (Southern Bell) requesting that we dismiss with prejudice the above-captioned proceedings and authorize the parties' agreement which settled the matters raised in the complaints. For the reasons set forth below, the joint motion is granted.

2. These proceedings were initiated by formal complaints filed by WUI against the defendants challenging the rates charged WUI for certain private line circuits pursuant to former Bell Systems Operating Companies Tariff F.C.C. No. 4. AT&T, Pacific Bell and Southern Bell filed answers denying any liability and denying WUI's entitlement to damages. Subsequently, the parties entered into settlement negotiations with the cooperation of the Enforcement Division. As a result of these negotiations, the parties reached a settlement that resolves all matters in controversy.

3. WUI, AT&T, Pacific Bell and Southern Bell represent that this agreement resolves all claims alleged in the complaints in a manner acceptable to all parties. The parties state that grant of their joint motion will conserve the time and resources of the parties and the Commission. On the basis of the statement contained in the parties' motion, we conclude that there are no longer issues in controversy and the proceeding should be terminated.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated in 47 C.F.R. § 0.291, that the Joint Motion to Dismiss filed by WUI, AT&T, Pacific Bell and Southern Bell IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Acting Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTERN UNION WORLD COMMUNICATIONS, INC.,
Complainant,

v. File No. TS-5-78

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, PACIFIC BELL AND SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,
Defendants.

ORDER

Adopted: April 6, 1989; Released: April 17, 1989

By the Acting Chief, Enforcement Division, Common Carrier Bureau:

1. We have before us a joint motion filed on March 31, 1989, by Western Union World Communications, Inc. (WU Worldcom),[1] American Telephone and Telegraph Company (AT&T), Pacific Bell, and Southern Bell Telephone and Telegraph Company (Southern Bell) requesting that we dismiss with prejudice the above-captioned proceeding and authorize the parties agreement which settled the matters raised in the complaints. For the reasons set forth below, the joint motion is granted.

2. This proceeding was initiated by a formal complaint filed by WU Worldcom against the defendants challenging the rates charged WU Worldcom for certain private line circuits pursuant to former Bell Systems Operating Companies Tariff F.C.C. No. 4. AT&T, Pacific Bell and Southern Bell filed answers denying any liability and denying WU Worldcom's entitlement to damages. Subsequently, the parties entered into settlement negotiations with the cooperation of the Enforcement Division. As a result of these negotiations, the parties reached a settlement that resolves all matters in controversy.

3. WU Worldcom, AT&T, Pacific Bell and Southern Bell represent that this agreement resolves all claims alleged in the complaints in a manner acceptable to all parties. The parties state that grant of their joint motion will conserve the time and resources of the parties and the Commission. On the basis of the statement contained in the parties' motion, we conclude that there are no longer issues in controversy and the proceeding should be terminated.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated in 47 C.F.R. § 0.291, that the Joint Motion to Dismiss filed by WU Worldcom, AT&T, Pacific Bell and Southern Bell IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Acting Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] "WU Worldcom" was formerly ITT World Communications, Inc. and references to complaints filed by WU Worldcom includes complaints filed by ITT World Communications, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-537

In the Matter of

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, Tariff F.C.C. No. 40 — Transmittal No. 930

NEW YORK TELEPHONE COMPANY, Traiff F.C.C. No. 41 — Transmittal No. 913

MEMORANDUM OPINION AND ORDER

Adopted: April 4, 1989; Released: April 5, 1989

By the Commission:

I. INTRODUCTION

1. On July 25, 1988, New England Telephone and Telegraph Company (NET) and New York Telephone Company (NYT), collectively the NYNEX Companies (NYNEX), filed the above-referenced tariff revisions, which sought to clarify that Feature Group A (FGA) lines may be included in the calculation and application of NYNEX's Equal Access Cost Recovery (EACR) rate element. MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate on August 9, 1988, and NYNEX filed a reply on August 19, 1988. Upon review of the NYNEX proposal and associated pleadings, the Common Carrier Bureau released an Order on November 4, 1988, suspending the tariff revisions for five months and initiating this investigation.[1]

II. BACKGROUND

2. The MCI petition argued that NYNEX should not include FGA lines in NYNEX's EACR rate element because those lines are not provided at end user locations, as that term is defined in both NYNEX tariffs and this Commission's Rules.[2] In addition, MCI argued that NYNEX was only seeking to revise its tariff because NYNEX had been erroneously billing MCI by including FGA lines in calculating MCI's EACR charge.

3. The NYNEX reply admitted that NYNEX had been including FGA lines in the calculation of its EACR charge. NYNEX reasoned that since the dispute merely stemmed from the fact that its tariffs were not clear as to whether FGA lines are included in the calculation of its EACR charge, NYNEX could properly choose to revise its tariffs to include FGA lines. In addition, NYNEX supported its contention that local exchange carriers (LECs) should be able to count FGA lines in calculating EACR charges by arguing that FGA lines can be presubscribed and used to gain access to interexchange carrier (IC) switches by dialing "1," "0," or "10XXX." NYNEX explained that ICs can use FGA lines to route interLATA traffic on their own networks, to route overflow traffic to other ICs' networks, and to provide private line services, such as Foreign Exchange. Hence, FGA lines, according to NYNEX, have equal access capabilities and should be included in calculating and applying its EACR charges.

4. Although we recently amended the Part 69 access charge rules to permit LECs to establish separate rate elements to recover equal access costs, [3] the currently effective access charge rules require that equal access costs be assigned to the Local Switching rate element. Several LECs, including NYNEX, have received waivers of the currently effective rules to permit those carriers to recover equal access costs through a separate rate element.[4] The *NYNEX Waiver Order* provides that NYNEX's EACR charge will be a flat rate monthly charge assessed to ICs who obtain Feature Group D (FGD) Switched Access Service.[5] The Order further states that the charge is calculated by multiplying the IC's percentage of presubscribed equal access lines in the LATA times the monthly rate per equal access line. The IC's percentage is determined by dividing the total number of presubscribed equal access lines and trunks in the LATA presubscribed to that IC by the total number of presubscribed equal access lines.[6]

5. The *Designation Order* in this proceeding tentatively concluded that the *NYNEX Waiver Order* only specifically refers to FGD lines and did not describe the inclusion of FGA lines in the calculation and application of NYNEX's EACR charges.[7] Therefore, the Bureau stated, it is questionable whether that NYNEX waiver was adequate to permit the tariff revisions NYNEX filed. Accordingly, the Bureau suspended NYNEX's proposed tariff revisions in order to determine whether Transmittals 930 and 913 are consistent with that waiver.[8]

III. PLEADINGS

6. In its direct case, filed December 5, 1988, NYNEX essentially reiterates the arguments it made in replying to MCI's petition to suspend and investigate.[9] Its only new argument is that the waiver granted in the *NYNEX Waiver Order* is not limited to FGD lines. NYNEX interprets the waiver as providing that while EACR rates can only be charged to customers who receive FGD Switched Access Service, the development of those EACR rates may include FGA lines presubscribed to those same customers.[10]

7. MCI filed a rebuttal to the NYNEX direct case on December 19, 1988. MCI fails to dispute NYNEX's interpretation of the *NYNEX Waiver Order*. Instead, MCI cites NYNEX's Tariff Review Plan (TRP) and Volume 4 of its Description and Justification (D&J) which accompanied its 1988 annual access tariff filing to support MCI's assertion that NYNEX never intended to include FGA lines in its EACR rate element.[11]

8. NYNEX replied to MCI's rebuttal on January 5, 1989. NYNEX concedes that its 1988 annual access filing did not specify each and every type of service that qualifies as a presubscribed equal access line, but that such an omission does not mean that NYNEX did not count presubscribed FGA lines as presubscribed equal access lines for purposes of EACR rate development.[12] NYNEX then concludes that because MCI does not address NYNEX's interpretation of the *NYNEX Waiver Order* and

because its argument regarding FGA lines not being counted is incorrect, this Commission should terminate the investigation and allow the two NYNEX transmittals to become effective.

IV. DISCUSSION

9. The pleadings filed by NYNEX and MCI pursuant to the *Designation Order* in this proceeding have not added anything to this Commission's body of knowledge on this issue. In particular, NYNEX fails to present an argument that would give us a reason to interpret the *NYNEX Waiver Order* to permit this tariff revision. The *NYNEX Waiver Order* stated that NYNEX's EACR charge would be a flat rate monthly charge assessed to ICs who obtain FGD Switched Access Service. The *NYNEX Waiver Order* only specifically referred to FGD lines and did not mention the inclusion of FGA lines in the calculation and application of NYNEX's EACR charge.

10. We conclude that the existing Part 69 waiver is quite narrow and extends only to FGD lines. We further conclude that the treatment of FGA lines for purposes of EACR rate calculation and application in this NYNEX transmittal violates the currently effective provisions in Part 69 of this Commission's Rules. Since NYNEX has not secured the necessary waiver of Part 69 to implement those tariff provisions, these tariff revisions are hereby found unlawful.

11. On February 17, 1989, this Commission released our *EACR Order* which modified our Part 69 access charge rules, effective May 1, 1989, to provide for the optional use of a separate rate element to recover equal access costs. Under the revised rules, LECs will be allowed to recover equal access costs through the Local Switching rate element or a separate rate element. The rules adopted in the *EACR Order* require LECs to adopt one of two rate structures in order to implement their chosen method of cost recovery – either a flat rate monthly charge per presubscribed equal access line, such as the one currently used by NYNEX, or a flat monthly charge per FGD trunk.[13]

12. The new rules will bar application of a separate EACR charge to FGA lines.[14] We based this decision on the fact that FGA lines have had a long-standing classification as providing non-premium access. We also stated, however, that LECs are free to request a waiver of our access charge rules if a LEC believes that its FGA lines provide sufficient equal access functionalities to warrant application of an EACR charge. *Id.* NYNEX will accordingly be permitted to seek a new waiver to include FGA lines if it chooses to do so. Should NYNEX choose to request such a waiver, it must make a strong showing that the FGA lines at issue provide sufficient equal access functionalities to warrant inclusion in the calculation and application of the EACR charge.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201(b), 204(a), and 205 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 204(a), 205, that the investigation of New England Telephone and Telegraph Company, Tariff F.C.C. No. 40, Transmittal No. 930, and New York Telephone Company, Tariff F.C.C. No. 41, Transmittal No. 913, IS TERMINATED.

14. IT IS FURTHER ORDERED that the proposed revisions in New England Telephone and Telegraph Company, Tariff F.C.C. No. 40, Transmittal No. 930, and New York Telephone Company, Tariff F.C.C. No. 41, Transmittal No. 913, ARE HEREBY FOUND UNLAWFUL.

15. IT IS FURTHER ORDERED that the New England Telephone and Telegraph Company and the New York Telephone Company SHALL FILE tariff revisions not later than five days from the release date of this Order, to become effective on one day's notice, in order to remove material from their tariffs that we have found to be unlawful. For this purpose, Sections 61.68 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived and Special Permission No. 89-199 is assigned.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] New England Telephone and Telegraph Company, Tariff F.C.C. No. 40, Transmittal No. 930 and New York Telephone Company, Tariff F.C.C. No. 41, Transmittal No. 913, DA 88-1757, released Nov. 4, 1988 (*Designation Order); see also* New England Telephone and Telegraph Company, Tariff F.C.C. No. 40, Transmittal No. 930 and New York Telephone Company, Tariff F.C.C. No. 41, Transmittal No. 913, CC Docket No. 88-537, Erratum, released Dec. 8, 1988.

[2] *See* New England Telephone and Telegraph Company, Tariff F.C.C. No. 40 and New York Telephone Company, Tariff F.C.C. No. 41 at Section 2.6; *see also* 47 C.F.R. § 69.2(m). Both the NYNEX tariffs and Section 69.2(m) of the Commission's Rules define end user as:

> Any customer of an interstate or foreign telecommunications service that is not a carrier, except that a carrier other than a telephone company shall be deemed to be an "end user" when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an "end user" if all resale transmissions offered by such reseller originate on the premises of such reseller.

[3] *See* MTS and WATS Market Structure: Amendment of Part 69 of the Commission's Rules for Recovery of Equal Access Costs, CC Docket No. 78-72, Memorandum Opinion and Order, FCC 89-16, released Feb. 17, 1989 (*EACR Order)* at paras. 14-15.

[4] *See* 47 C.F.R. §§ 69.308, 69.410; *see also* New England Telephone and Telegraph Company and New York Telephone Company, Mimeo No. 2636, released Feb. 20, 1985 (*NYNEX Waiver Order).*

[5] *See NYNEX Waiver Order* at para. 2.

[6] *Id.*

[7] *Designation Order* at para. 6.

[8] *Id.* at para. 7.

[9] *See* NYNEX Direct Case at 3-5.

[10] *Id.* at 6.

[11] MCI Rebuttal to NYNEX Direct Case at 2.
[12] NYNEX Reply at 3-4.
[13] *EACR Order* at paras. 22-26.
[14] *Id.* at para. 26 n.84.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-287

In the Matter of

SOUTHWESTERN BELL TELEPHONE COMPANY — Transmittal No. 1629
Revisions to Tariff F.C.C. No. 6

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY — Transmittal No. 925
Revisions to Tariff F.C.C. No. 40

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, NORTHWESTERN BELL TELEPHONE COMPANY, AND PACIFIC NORTHWEST BELL TELEPHONE COMPANY — Transmittal No. 104
Revisions to Tariff F.C.C. No. 1

CONTEL SERVICE CORPORATION — Transmittal No. 7
Revisions to Tariff F.C.C. No. 1

PACIFIC BELL TELEPHONE COMPANY

NEW YORK TELEPHONE COMPANY

ORDER

Adopted: April 10, 1989; Released: April 11, 1989

By the Chief, Common Carrier Bureau:

1. On March 17, 1989, this Bureau released an Order Designating Issues for Investigation related to the provision of access service through the use of alternate technologies by the above-referenced Bell Operating Companies (BOCs).[1] On March 31, 1989, Southwestern Bell Telephone Company (SWB) filed a petition for clarification or in the alternative motion for extension of time in regard to the *Revised Investigation Order*. Comments in support of SWB's motion were filed by Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West) on April 3, 1989.

2. The *Revised Investigation Order* requires the subject carriers to file direct cases in response to the issues designated for investigation by April 14, 1989. SWB requests clarification regarding the information and testing required to comply with the issues designated and information requested in the Order, and the burden of proof applicable in the investigation. In the alternative, SWB requests that the time for filing direct cases be extended, asserting that a response to some of the issues designated in the *Revised Investigation Order* will require a significant commitment of personnel and funding and the time required to perform the necessary tasks exceeds the time allowed.

3. In its comments, US West supports SWB's request for clarification and extension of time, but also recognizes the necessity of concluding the investigation pursuant to the applicable statutory deadline. Accordingly, it requests an extension of the deadline for filing direct cases to May 5, 1989. US West asserts that more time is required to develop direct cases than to respond to them, and requests that either the time for filing direct cases be extended, or that the time for filing oppositions be decreased.

4. We have reviewed the requests presented by SWB and US West, and have concluded that the *Revised Investigation Order* does not require the requested clarification. In addition, we conclude that SWB's requested extension of thirteen months is unreasonable in light of the requirements of the *Revised Designation Order*, and that SWB has not provided adequate grounds in support of its request.

5. In light of the concerns expressed by US West regarding the time for filing the direct cases, however, we have also concluded that a revision in the pleading cycle established in this investigation is warranted. Accordingly, we will grant an extension of one week for the filing of direct cases in this investigation.[2] Direct cases by each carrier subject to this investigation must be filed no later than April 21, 1989. Pleadings opposing the direct cases may be filed by interested parties no later than May 26, 1989, and rebuttals to oppositions may be filed by each subject carrier no later than June 6, 1989.

6. Accordingly, IT IS ORDERED that the petition for clarification and motion for extension of time filed by Southwestern Bell Telephone Company IS DENIED.

7. IT IS FURTHER ORDERED that the deadlines for filing in the above-referenced investigation ARE EXTENDED as provided in paragraph 5 above.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Southwestern Bell Telephone Company, *et al.*, CC Docket No. 88-287, Order Designating Issues for Investigation, DA 89-309, released Mar. 17, 1989 (*Revised Investigation Order*). Pursuant to proposed tariff revisions filed by Contel Service Corporation (Contel), this Bureau released an Order, *inter alia*, including Contel in this investigation and designating an additional issue for investigation. Contel Service Corporation, Transmittal No. 7, Memorandum Opinion and Order, 4 FCC Rcd 2565 (1989) (*Contel Order*).

[2] Our action in this Order applies to both the *Revised Investigation Order* and the *Contel Order* since both Orders are subject to the same pleading cycle.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-494

In the Matter of

Amendment of Section 73.202(b), RM-6412
Table of Allotments,
FM Broadcast Stations.
(Clarinda, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 29, 1989; Released: April 18, 1989

By the Chief, Allocations Branch:

1. At the request of G.O. Radio, Ltd. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 6124 (1988), proposing the substitution of Channel 291C2 for Channel 292A at Clarinda, Iowa, and the modification of its license for Station KQIS-FM to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for Channel 291C2, if allotted.[1]

2. We believe the public interest would be served by substituting Channel 291C2 for Channel 292A at Clarinda, since it could enable Station KQIS-FM to expand its coverage area. Channel 291C2 can be allotted to Clarinda in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.3 kilometers (5.8 miles) east to avoid a short-spacing to unused but applied for Channel 290A at Omaha, Nebraska.[2] As proposed, we shall also modify petitioner's license for Station KQIS-FM to specify operation on Channel 291C2.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 2, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Clarinda, Iowa	291C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of G.O. Radio, Ltd. for Station KQIS-FM, Clarinda, Iowa, IS MODIFIED to specify operation on Channel 291C2, in lieu of Channel 292A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Supplemental comments were filed by the petitioner after the close of the record herein. Petitioner states that an application for assignment of Station KQIS-FM's license to KMA Broadcasting, L.P. was filed on January 3, 1989. However, it states that it remains committed to upgrading the station and appends a letter from KMA Broadcasting, L.P. stating that it also will pursue the upgrading of the station as proposed. We will accept petitioner's supplemental comments for purposes of reiterating its intention to apply for the channel, if allotted.

[2] The coordinates for this allotment are North Latitude 40-42-42 and West Longitude 94-55-55.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-504

In the Matter of

Amendment of Section 73.202(b), RM-6444
Table of Allotments,
FM Broadcast Stations.
(Ossian, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 28, 1989; Released: April 18, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 6222 (1988), proposing the allotment of Channel 241A to Ossian, Iowa, as the community's first local FM service, at the request of Mega Media, Ltd. (petitioner). No comments were received by the petitioner or any other party.

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is, therefore, the Commission's general policy to refrain from making allotments to a community absent such an expression of interest. Since no such interest has been expressed, we will dismiss petitioner's proposal.

3. Accordingly, IT IS ORDERED, That the petition of Mega Media, Ltd. requesting the allotment of Channel 241A to Ossian, Iowa, IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-76

In the Matter of

Amendment of Section 73.202(b), RM-6054
Table of Allotments,
FM Broadcast Stations.
(Alma and Dublin, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 28, 1989; Released: April 18, 1989

By the Chief, Allocations Branch:

1. At the request of State Broadcasting Company, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 3 FCC Rcd 1055 (1988), proposing the substitution of Channel 240C2 for Channel 240A at Dublin, Georgia, and the modification of its license for Station WQZY(FM) to specify operation on the higher powered channel. In addition, an *Order to Show Cause* was issued to Queen City Broadcasting System, Inc. (Queen City), proposing the substitution of Channel 282A for Channel 240A at Alma, Georgia, and the modification of its license for Station WKXH-FM to specify operation on the alternate Class A channel. Petitioner and Reidsville Broadcasting Corp. (RBC), applicant for Channel 281A, Reidsville, Georgia, filed comments. Petitioner and John Hugh Wiggins, proposed assignee of Queen City filed reply comments.[1] In addition, RBC filed a Motion for Leave to File and Response to petitioner's reply comments.[2]

2. RBC opposes the allotment of Channel 282A to Alma since it would result in an 8 kilometer short-spacing between the transmitter site specified in its pending application for Channel 281A at Reidsville (ARN-871223MN) and Station WKXH-FM at Alma. Although it recognizes that the four alternate channels suggested by petitioner for use at Alma were rejected by the Commission for technical reasons, it requests that we reconsider their use.

3. In response, petitioner argues that use of RBC's desired transmitter site should not prevail over the provision of new service which Station WQZY(FM) could provide if upgraded to a Class C2 channel. It points out that the allotment of Channel 282A at Alma, as proposed, complies with the spacing requirements to the Channel 281A allotment coordinates at Reidsville. Further, it states that there is a transmitter site area of more than 25 square miles in which RBC could obtain a site in compliance with the Commission's technical requirements, including the required spacing to Station WKXH-FM's existing site. Finally, petitioner argues that RBC's status as an applicant, unlike that of a permittee or licensee, does not protect it against competing rule making requests, citing *Freedom and Morgan Hill, California*, 62 RR 2d 1057 (1987).

4. Wiggins also opposes the substitution of Channel 282A for Channel 240A at Alma, stating that the "inevitable" disruption in service with the attendant possible loss in audience by Station WKYH-FM, would cause a hardship on the residents of Alma. He also opposes RBC's request that the Commission reconsider one of the channels which it rejected in the *Notice* since the use of these channels would require the relocation of the station's transmitter. Wiggins notes that the Commission's stated policy in this area is an unwillingness to require an existing station to relocate its transmitter in order for a new allotment to meet the spacing requirements absent an unusually strong and compelling showing that the public interest benefits are sufficient to overcome the resultant impact on the affected station and the public, citing *Asheville, North Carolina*, 36 RR 2d 810, 815 (1976) and *Columbia, South Carolina*, 62 RR 2d 1168 (1987). In this case, Wiggins asserts that such a showing cannot be made. According to Wiggins, grant of petitioner's request would not result in the provision of a new service but only in the upgrading of one of Dublin's four existing local radio services.

5. RBC, in its Response to petitioner's reply comments, argues that the petitioner failed to address the aeronautical impact of the relocation of the Reidsville transmitter. Specifically, RBC states that the area to which it would have to relocate is at the approach end of Runway 29 and the departure end of Runway 11 of the Reidsville airport. In addition, RBC contends that the areas surrounding airports which have non-directional beacons for inclement weather instrument landings, like the Reidsville airport, are protected to a greater extent than are the areas surrounding airports used only for clear, non-instrument weather landings. Thus, it is uncertain of obtaining FAA approval for a transmitter site within the restricted area. Finally, RBC states that use of its applied-for site will enable it to serve 30,552 persons while use of a site in the area proposed by the petitioner, as far from the airport as possible while also permitting the required 3.16 mV/m signal over the community, would allow it to serve only 26,577 persons within its 1 mV/m contour. Thus, it believes that the public interest would be better served by denying petitioner's requested upgrade at Dublin with the comcomitant change of channels at Alma.

6. Based on the record before us, we find that the public interest would be served by substituting Channel 240C2 for Channel 240A at Dublin, Georgia, and the comcomitant substitution of Channel 282A for Channel 240A at Alma, Georgia, since it could enable Station WQZY(FM) to expand its coverage area. As the Commission has stated before, there is an inherent public interest benefit in upgrading stations to the maximum extent possible because upgrades permit service to a greater number of people. *See Grundy Center, Iowa*, 3 FCC Rcd 3965 (1988). We recognize that this action will require Station WKXH-FM at Alma to modify its operation to specify operation on Channel 282A in lieu of its present Channel 240A. In the *Order to Show Cause*, the Commission directed the licensee of Station WKXH-FM to show, with particularity, why its license should not be modified to specify operation on Channel 282A. The licensee did not file comments in response and is thus deemed to have consented to the modification. We note that petitioner has

stated its intention to reimburse Station WKXH-FM for the reasonable expenses incurred in modifying its operation to Channel 282A. We also find that Wiggins has not presented a sufficiently compelling reason to warrant a decision which would retain Channel 240A at Alma. We agree, however, that RBC has not provided the unusually strong and compelling showing of public interest benefit which would justify the modification of Station WKXH-FM's license to a channel which would require the station to relocate its transmitter site.

7. We also find that RBC has failed to show that the site proposed in its pending application should be considered as anything more than a preference. Noting that it already has FAA approval for the site specified in its application, it argues that it will encounter aeronautical problems in use of a new site since the area where the transmitter would have to be located is near the Reidsville airport. In addition, it contends that use of a site sufficiently far from the airport but also permitting the required 70 dBu coverage to all of Reidsville will result in a diminution of the population which it can serve. However, RBC has not shown that sites are unavailable in the restricted area which would protect Channel 282A at Alma, provide all of Reidsville with the required 70 dBu signal, and also satisfy FAA concerns. In addition, RBC provides no showing that use of its applied-for site will result in the provision of any first or second aural service. Finally, we have confirmed that Channel 282A is the only channel which can be used at Station WKXH-FM's present transmitter site. While RBC requested that we reconsider the use of the alternate channels proposed by the petitioner, we have found that it failed to provide the public interest showing required for the Commission to justify the forced relocation of an existing station's transmitter site. *See* paragraph 6, *supra*.

8. Based on the above discussion, we are substituting Channel 240C2 for Channel 240A at Dublin, Georgia, and substituting Channel 282A for Channel 240A at Alma, Georgia. Channel 240C2 can be allotted to Dublin in compliance with the Commission's minimum distance separation requirements and can be used at the present transmitter site of Station WKXH-FM. Channel 282A can be allotted to Alma in compliance with the Commission's minimum distance separation requirements and can be used at Station WQZY(FM)'s present transmitter site.[3] As proposed, we shall also modify the licenses of State Broadcasting Company, Inc. to specify Channel 240C2 at Dublin and Queen City Broadcasting System, Inc. to specify Channel 282A at Alma.

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 2, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Alma, Georgia	282A
Dublin, Georgia	224A, 240C2

10. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of State Broadcasting Company, Inc. for Station WQZY(FM), Dublin, Georgia, IS MODIFIED, effective **June 2, 1989,** to specify operation on Channel 240C2, in lieu of Channel 240A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

11. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WKXH-FM, Alma, Georgia, IS MODIFIED to specify operation on Channel 282A in lieu of Channel 240A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WKXH-FM's license, BLH-870528KD, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-870528KD, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

12. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee of Station WKXH-FM, as follows: Queen City Broadcasting System, Box 1987, Alma, Georgia 31510.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Wiggins opposition to the modification of Station WKYH-FM's license cannot be considered as an opposition by the licensee since the Commission did not grant the transfer of control application (BTCH-880414GQ) from Farnell and Evona O'Quinn to John Hugh Wiggins until September 18, 1988, after responses to the *Order to Show Cause* were due. Therefore, Wiggins' reply comments will be considered only as an opposition to the allotment of Channel 240C2 to Dublin.

[2] RBC requests acceptance of its response, stating that petitioner, for the first time in its reply comments, sought an action which could result in the dismissal of its application. The Commission's Rules do not contemplate the filing of pleadings in response to reply comments. However, in this case, we believe the public interest would be served by the acceptance of RBC's Response since the *Notice* failed to apprise RBC of the potential conflict between the proposal and its pending application.

[3] The coordinates for Channel 240C2 at Dublin are North Latitude 32-33-51 and West Longitude 82-52-18. The coordinates for Channel 282A at Alma are North Latitude 31-36-26 and West Longitude 82-32-46.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-498

In the Matter of

Amendment of Section 73.202(b), RM-6486
Table of Allotments,
FM Broadcast Stations.
(Wahpeton, North Dakota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 5, 1989; Released: April 18, 1989

By the Chief, Allocations Branch:

1. At the request of Guderian Broadcasting, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 6204 (1988), proposing the substitution of Channel 295C2 for Channel 296A at Wahpeton, North Dakota, and the modification of its construction permit for Station KGWB to specify the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by substituting Channel 295C2 for Channel 296A at Wahpeton, North Dakota, since it could enable Station KGWB to increase its coverage area. Channel 295C2 can be allotted to Wahpeton in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.6 kilometers (5.3 miles) northeast to avoid a short-spacing to Station KGIM-FM, Channel 294C1, Aberdeen, South Dakota.[1] Canadian concurrence has been obtained since Wahpeton is located within 320 kilometers (200 miles) of the U.S.-Canadian border. As proposed, we shall also modify petitioner's construction permit for Station KGWB to specify operation on Channel 295C2.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 2, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Wahpeton, North Dakota	295C2

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit of Station KGWB, Wahpeton, North Dakota, IS MODIFIED to specify operation on Channel 295C2 in lieu of Channel 296A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 46-18-00 and West Longitude 96-29-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-520

In the Matter of

Amendment of Section 73.202(b),	RM-6516
Table of Allotments,	RM-6585
FM Broadcast Stations.	RM-6651
(Woodstock, Broadway, Buena Vista,	RM-6652
Staunton and New Market, Virginia)[1]	RM-6653

ORDERS TO SHOW CAUSE

Adopted: April 3, 1989; Released: April 18, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making and Order to Show Cause*, 3 FCC Rcd 6512 (1988), issued in response to a petition for rule making filed by Ruarch Associates (Ruarch), proposing the substitution of Channel 241B1 for Channel 240A at Woodstock, Virginia and the modification of the construction permit for Station WAZR(FM) to specify the higher class channel. Ruarch, the permittee of Station WAZR(FM), also suggested the substitution of Channel 226A for Channel 238A at Broadway, Virginia, in order to accommodate the upgrade at Woodstock. In addition, Massanutten Broadcasting Co., Inc. (Massanutten), the permittee of Station WLTK(FM) at Broadway, was ordered to show cause why its permit should not be modified to specify operation on Channel 226A in lieu of Channel 238A.

2. In response the *Notice*, Ruarch filed comments reiterating its interest in the proposal. Massanutten, Shenandoah County Broadcasting Corporation (Shenandoah), permittee of Station WSIG(FM), Channel 245A, at Mount Jackson, Virginia, and Charles B. Johnson (Johnson) filed counterproposals.[2] Also accepted as a counterproposal was a petition for rule making filed by Equus Communications, Inc. (Equus), licensee of Station WVLI(FM), Channel 244A at Buena Vista, Virginia, requesting the substitution of Channel 245B1 for Channel 244A and modification of its license accordingly.[3] Equus states that if the proposed substitution is made at Buena Vista, it will upgrade to the higher class station.

3. Massanutten suggests the substitution of Channel 241B1 for Channel 238A at Broadway and the modification of its permit to specify operation on the higher class channel. To accomplish the upgrade at Broadway, Massanutten proposes to either substitute Channel 229A or Channel 229B1 for Channel 240A at Woodstock. It states that the proposed substitution of Channel 229B1 at Woodstock requires the substitution of Channel 226A for Channel 228A at Staunton, Virginia, which is currently occupied by Station WSGM(FM). Massanutten urges the adoption of its counterproposal since it "represents a more efficient use of spectrum than does the original proposal to allocate Channel 241B1 to Woodstock."

4. Shenandoah requests the substitution of Channel 245B1 for Channel 245A at Mount Jackson and the modification of its permit to specify the higher class co-channel. Shenandoah suggests the substitution of Channel 241A for Channel 244A at Orange, Virginia, which is currently occupied by Station WVJZ(FM), in order to accommodate the upgrade at Mount Jackson. Shenandoah states it will file an application for the modification of its construction permit.

5. Johnson seeks the allotment of Channel 226A to New Market, Virginia, as that community's first local service instead of permitting the upgrade at Woodstock, which requires the substitution of Channel 226A for 238A at Broadway. Johnson expresses his intention in applying for the channel.

6. We find that the aforementioned proposals are mutually exclusive to the proposal set forth in the *Notice* due to the suggested use of either Channel 241(A or B1) or Channel 226A at other cities. (1) Massanutten's proposal to substitute Channel 241B1 for 238A at Broadway and Channel 229A for Channel 240A at Woodstock is in direct conflict with the petitioner's proposal for Channel 241B1 at Woodstock. (2) Massanutten also suggests an alternative proposal which would permit both Broadway and Woodstock to accomplish upgrades by the substitution of Channel 241B1 at Broadway and the substitution of Channel 229B1 for Channel 240A at Woodstock. The substitution of Channel 229B1 at Woodstock, requires the substitution of Channel 226A for Channel 228A at Staunton. (3) Johnson's proposal to allot Channel 226A to New Market conflicts with the petitioner's proposal to use Channel 226A at Broadway, as well as the use of Channel 226A at Staunton. (4) Shenandoah's proposal to substitute Channel 245B1 for Channel 245A at Mount Jackson, also conflicts with the proposals to use Channel 241B1 at either Woodstock or Broadway since it requires the substitution of Channel 241A for Channel 244A at Orange. (5) It is necessary to consider the Equus proposal to substitute Channel 245B1 for Channel 244A at Buena Vista here because it is mutually exclusive with the proposal to allot Channel 245B1 at Mount Jackson.

7. In reply comments, petitioner acknowledges the counterproposals filed herein and suggests an alternative channel for consideration at New Market. Petitioner states that it would not oppose the substitution of Channel 229A or 229B1 at Woodstock, if both Woodstock and Broadway are permitted to upgrade.

8. Equus claims that its proposal for Channel 245B1 at Buena Vista will provide new service to 36,787 more people than Channel 245B1 at Mount Jackson, i.e. 120,593 as opposed to 83,806. Equus concludes that in comparison the Buena Vista proposal for Channel 245B1 is superior to the Mount Jackson proposal.

9. Shenandoah, in its reply comments, suggests the substitution of Channel 244B1 for Channel 245A at Buena Vista, to remove the need for a community comparison between Mount Jackson and Buena Vista for Channel 245B1.

10. It appears that each of the petitioner's requests can be accommodated. First, Channel 277A can be allotted to New Market in compliance with the Commission's minimum spacing separation requirements with a site restric-

tion of 0.7 kilometer (0.4 mile) west of the city.[4] Second, in view of the fact that no party has expressed an interest in the non-adjacent channel at Woodstock, Channel 229B1 can be substituted for Channel 240A at Woodstock, with a site restriction, and provided Channel 226A is substituted for Channel 228A at Staunton.[5] Third, Channel 241B1 can be allotted to Broadway at the current transmitter site specified in the construction permit for Station WLTK(FM).[6] Fourth, Channel 245B1 can be substituted for Channel 245A at Mount Jackson with a site restriction of 7.6 kilometers (4.7 miles) west of the city, if Channel 255A is substituted for Channel 244A at Orange.[7] Channel 244B1 can be substituted for Channel 244A at Buena Vista with a site restriction of 11.6 kilometers (7.2 miles) east of the city.[8]

11. The proposed substitutions at Woodstock (Channel 229B1) and Mount Jackson require changes to licensed facilities at Staunton and Orange, respectively. Therefore, we are herein issuing *Show Cause Orders* to Clark Broadcasting Company, licensee of Station WSGM(FM) and Radio Virginia Limited Partnership, licensee of Station WVJZ(FM) seeking comments as to why their licenses should not be modified to specify operation on Channel 226A (in lieu of Channel 228A) and 255A (in lieu of Channel 244A), respectively. This *Order* does not afford an additional opportunity for parties to either comment on the relative merits of the proposals or to tender additional counterproposals.

12. In accordance with Commission policy Stations WSGM(FM) and WVJZ(FM) are entitled to reimbursement for the reasonable costs of changing their frequencies by the benefitting party. Here, Ruarch and Shenandoah have expressed their willingness to reimburse in order to accomplish their desired stations upgrades.

13. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Clark Broadcasting Company, licensee of Station WSGM(FM), Channel 228A, Staunton, Virginia, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 226A in lieu of Channel 228A.

14. Pursuant to Section 1.87 of the Commission's Rules, Clark Broadcasting Company, may, not later than **June 9, 1989** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Clark Broadcasting Company, to furnish additional information. If Clark Broadcasting Company, raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Clark Broadcasting Company, will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

15. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Radio Virginia Limited Partnership, licensee of Station WVJZ(FM), Channel 244A, Orange, Virginia, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 241A in lieu of Channel 244A.

16. Pursuant to Section 1.87 of the Commission's Rules, Radio Virginia Limited Partnership, may, not later than **June 9, 1989,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Radio Virginia Limited Partnership, to furnish additional information. If Radio Virginia Limited Partnership, raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Radio Virginia Limited Partnership, will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

17. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Radio Virginia Limited Partnership
1400 Mercantile Lane
Landover, MD 20785

Clark Broadcasting Company
P. O. Box 2189
Staunton, VA 24401

18. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

19. Interested parties may file comments on or before **June 9, 1989,** and reply comments on or before **June 26, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Howard W. Simcox, Jr., Esquire
Borsari & Paxson
2100 M Street, NW
Suite 610
Washington, D. C. 20037
(Counsel for Ruarch Associates)

David Tillotson, Esquire
Arent, Fox, Kintner,
Plotkin & Kahn
1050 Connecticut Avenue, NW
Washington, D. C. 20036
(Counsel for Massanutten Broadcasting Company, Inc.)

Jeffrey D. Southmayd, Esquire
Southmayd Powell & Taylor
1764 Church Street, NW
Washington, D. C. 20036
(Counsel for Shenandoah County Broadcasting Corporation)

Cary S. Tepper, Esquire
Putbrese, Hunsaker & Ruddy
6800 Fleetwood Road
P. O. Box 539
McLean, Virginia 22101
(Counsel for Equus Communications, Inc.)

Mr. Charles B. Johnson
7203 Robin Road
Dallas, Texas 75209
(Petitioner for New Market, Virginia)

20. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

21. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The communities of Buena Vista, Staunton and New Market, Virginia, have been added to the caption.

[2] Public Notice of the counterproposals was given on January 23, 1989, Report No. 1766.

[3] *Id.*

[4] The restricted site coordinates are 38-38-00 and 78-42-42.

[5] Channel 229B1 at Woodstock requires a site restriction of 21.8 kilometers (13.5 miles) west of the city. The coordinates for the restricted site at Woodstock are 38-48-18 and 78-44-18. Channel 226A can be used at the current transmitter site of Station WSGM(FM) at Staunton. The coordinates are 38-10-27 and 79-04-12.

[6] The coordinates are 38-36-31 and 78-54-07.

[7] The restricted site coordinates are 38-44-41 and 78-43-51 for Channel 245B1 at Mount Jackson. The coordinates of the current transmitter site for Station WVJZ(FM) at Orange can be used, which are 38-15-14 and 78-07-15.

[8] The restricted site coordinates are 37-43-22 and 79-13-23. We note that Channel 244B1 at Buena Vista also requires the channel change at Orange. However, Equus would not be required to share in the reimbursement of Station WVJZ(FM) since, comparing Mount Jackson and Buena Vista for Channel 245B1 based on the information provided, the Buena Vista proposal would prevail.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-84

In the Matter of

Amendment of Section 73.202(b), RM-6656
Table of Allotments,
FM Broadcast Stations.
(Mason, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 3, 1989; Released: April 18, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Roy E. Henderson, d/b/a Hill Country Communications (petitioner), proposing the substitution of Channel 249C2 for Channel 250C2 at Mason, Texas.

2. Petitioner, the sole applicant for Channel 250C2 at Mason, Texas (BPH-881027ML), states that the channel substitution would allow a relocation of its proposed transmitter site to an area that is far more desirable than the current "westerly site restriction" permits for the present channel. Petitioner submits information in support of its proposal and states its intention to effectuate the changes accordingly.

3. Channel 249C2 can be substituted for Channel 250C2 consistent with the Commission's minimum distance separation requirements with a site restriction of 18.7 kilometers (11.6 miles) southeast of the Mason.[1] The site restriction is required in order to avoid short spacings to Station KWTX-FM, Channel 248C, Waco, Texas, and Station KGKL-FM, Channel 248C1, San Angelo, Texas. However, petitioner suggests a site 28.2 kilometers (17.5 miles) southeast of the Mason.[2] Since Mason is located within 320 kilometers (199 miles) of the U.S.-Mexico border, Mexican concurrence must be obtained for the proposal.

4. We believe the proposal warrants consideration. In accordance with our established policy, since no upgrade in the class of channel is proposed, the petitioner will be permitted to amend its application to specify Channel 249C2, if allotted, and retain cut-off protection. Accordingly, we believe it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Mason, Texas	250C2	249C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 9, 1989,** and reply comments on or before **June 26, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Roy E. Henderson
Hill Country Communications
839 Timber Cove
Seabrook, Texas 77586
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The restricted site coordinates are 30-37-13 and 99-06-29.

[2] The coordinates are 30-31-00 and 99-07-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-303

In the Matter of

Amendment of Section 73.202(b), RM-5236
Table of Allotments,
FM Broadcast Stations.
(Pleasant Hope, Missouri)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: March 29, 1989; Released: April 18, 1989

By the Chief, Allocations Branch:

1. The Commission has before it a Petition for Reconsideration[1] filed by Aurora Broadcasting, Inc. (Aurora Broadcasting), of the *Report and Order*, 2 FCC Rcd 5709 (1987), allotting Channel 238C2 to Pleasant Hope, Missouri.

2. Aurora Broadcasting petitioned the Commission to reconsider the allotment of FM Channel 238C2 at Pleasant Hope, Missouri, in an attempt to upgrade Channel 261A at Aurora. In particular, Aurora Broadcasting's interest involved the substitution of a Class C2 channel at Aurora, Missouri, and modification of the license of Station KELE(FM) to specify Channel 258C2. Aurora Broadcasting has since filed a new petition requesting the substitution of Channel 263C2 for Channel 261A at Aurora, Missouri, and modification of its license for Station KELE(FM) to specify operation on the new channel. The *Report and Order* in MM Docket 87-474, 4 FCC Rcd 674 (1989), granted its request. Aurora Broadcasting has since filed comments requesting the withdrawal of its Petition for Reconsideration.

3. In view of the foregoing, IT IS ORDERED, That the petition of Aurora Broadcasting, Inc., IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Public Notice was given on November 16, 1987, Report No. 1691.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PAUL AND NANCY SCHUMACHER — File No. BPH-870519IC

For a Construction Permit to Modify
the Facilities of Station WSJL(FM),
Cape May, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: April 7, 1989; Released: April 18, 1989

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief, Mass Media Bureau acting pursuant to authority delegated under 47 C.F.R. Sections 0.61 and 0.283, has before it the request of Paul and Nancy Schumacher (the Schumachers) for reconsideration of the *Memorandum Opinion and Order* in this proceeding, DA 88-1910, released December 16, 1988, which modified their construction permit to modify the facilities of station WSJL(FM) to specify operation with an overall tower height of 244 feet above ground level (AGL) and 254 feet above mean sea level (AMSL). The Schumachers have also requested that a stay of the *Order* be issued pending a decision on the petition for reconsideration.

2. *Background.* On June 2, 1985, the Schumachers notified the F.A.A. of a proposed alteration in the technical facilities of WSJL(FM). The F.A.A.'s aeronautical study no. 85-AEA-0675-OE indicated that the proposed tower would not be a hazard to air navigation if it were reduced to a height of 244 feet AGL, 254 feet AMSL; the determination was issued on May 2, 1986 and was valid for six months. On April 22, 1987, the F.A.A. granted a six-month extension of time for the May 2 grant. However, the extension erroneously specified the originally proposed height of 310 feet AMSL rather than the negotiated height of 254 feet AMSL. On May 19, 1987, the Schumachers filed the instant modification, requesting *inter alia*, an increase in tower height to 310 feet AMSL. The application was granted on January 27, 1988, and the proposed antenna tower has since been erected. However, on June 2, 1988, the F.A.A. issued a "Determination of Hazard to Air Navigation," indicating that the error in the extension did not change the conditions of the original determination.

3. On October 18, 1988, the Commission issued an order to show cause why the Schumachers' permit (File no. BPH-870519IC) should not be modified to specify operation with a maximum tower height of 244 feet AGL, 254 feet AMSL. *See* 47 C.F.R. § 17.4(e).[1] The Schumachers filed a response to the *Order to Show Cause* on November 2, 1988. The *Memorandum Opinion and Order* of December 16, 1988 held that the Schumachers had not raised a substantial and material question of fact, as required by Section 1.87 of the Commission's Rules, as to whether or not the 300 foot WSJL(FM) tower constituted an air hazard. Specifically, it was found that Mr. Schumacher's assertions that no aircraft should approach the Cape May Airport at 300 feet AGL and that the tower is located "nowhere near" the airport's instrument approach flight paths did not provide sufficient contrary evidence to the F.A.A.'s determination to justify a hearing on the matter.

4. On December 23, 1988, the Schumachers filed a petition for reconsideration. In that petition, the Schumachers state: (i) WSJL(FM) is planning to make space on its tower available to the permittees of three Class A FM stations allocated to the Cape May service area, because of the difficulty in locating a site to construct a tower of "realistic height" to provide full coverage, and this will not be possible on a 244 foot tower; (ii) since the F.A.A. has already been forced to raise the approach levels for flights approaching Cape May Airport due to the current height of WSJL(FM)'s tower, no air hazard presently exists; and (iii) WSJL(FM) will suffer economic hardship unless the *Memorandum Opinion and Order* is reversed.

5. Reconsideration is warranted only if the petitioner cites errors of fact or law, or has presented changed facts or circumstances which raise substantial or material questions of fact which otherwise warrant Commission review of its prior actions. *See* 47 C.F.R. Section 1.106. Furthermore, the Commission has ruled that reconsideration will not be granted for the purpose of reviewing matters which the Commission has previously considered and resolved. *See WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd. sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

6. *Discussion.* Preliminarily, we note that, beyond a mere request, the Schumachers have provided no basis for issuance of a stay in this matter. *See Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1959), *modified, Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). As to their petition for reconsideration, the Schumachers cite no errors in the *Memorandum Opinion and Order* of December 16, 1988, nor do they rely on any changed circumstances. The issues raised here are essentially the same as those in the response to the *Order to Show Cause, i.e.*, that suitable tower sites are unavailable in the Cape May area, that WSJL(FM)'s current tower height does not really pose a hazard to air navigation, and that hardships to WSJL(FM) would result from the lowering of the tower. These issues were addressed in the *Memorandum Opinion and Order*, and were resolved adversely to the Schumachers.

7. Moreover, as was noted in the *Memorandum Opinion and Order*, the only one of these issues which is relevant is the existence of a hazard to air navigation. While the Commission cannot delegate to the F.A.A. its responsibility to make the final determination as to whether or not a modification of facilities would serve the public interest, it nonetheless relies heavily on the F.A.A.'s expertise in matters of air safety. The Commission will defer to an F.A.A. determination of air safety issues if appropriate. *See City of New York Municipal Broadcasting System*, 52 R.R.2d 541 (1982), WLCY-TV, 38 FCC 2d 86 (1972). The Schumachers' petition provides no basis for concluding that the Commission erred in its decision to modify the construction permit in accordance with the F.A.A.'s determination. The Commission cannot find, on the basis of

the record here, that the structure will not unreasonably menace air traffic or require the modification of navigational procedures. *City of New York Municipal Broadcasting System, supra,* 52 R.R.2d at 556. Although we are sympathetic to the hardship this decision may cause the Schumachers, we believe that any further consideration with regard to the air hazard posed by WSJL(FM)'s tower should be made by the F.A.A.

8. Accordingly, pursuant to authority contained in Section 405, of the Communications Act of 1934, as amended, and Section 0.238 and 1.106 of the Commission's Rules, IT IS ORDERED That the petition for reconsideration of the modification of the construction permit (BPH-870519IC) of Station WSJL(FM), Cape May, New Jersey, and the accompanying request for stay, ARE DENIED.

9. IT IS FURTHER ORDERED, That a copy of this document shall be mailed to each party to this proceeding.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker, Chief
Mass Media Bureau

FOOTNOTE

[1] 47 C.F.R. § 17.4(e) states: "Whenever a report is received from the FAA indicating that a proposed antenna structure is a hazard, the Commission will take further appropriate action."

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTELCONSULT CORPORATION — CSG-89-019-P/L

Application for authority to construct and operate a very small aperture terminal (VSAT) 2.4-meter Ku-band fixed transmit/receive earth station at Chula Vista, California for the purpose of communicating with the Morelos I satellite

CYLIX COMMUNICATIONS CORPORATION — CSG-89-022-ML, CSG-89-020-ML, CSG-89-021-ML

Application for authority to modify and operate a 6.1-meter Ku-band fixed satellite earth station at Memphis, Tennessee (Call Sign E873412) and 1.8 and 2.4-meter Ku-band earth stations (Call Signs E860122 and E880915) to add the Anik and Morelos satellite systems as points of communication

OVERSEAS TELECOMMUNICATIONS, INC. — CSG-89-023-ML

Application for authority to modify and operate a 4.6-meter and a 2.4-meter Ku-band fixed satellite earth station (Call Sign E881385) at Irving, Texas, for the purpose of communicating with the Anik and Morelos satellite systems

TELECOM BROADCASTING, INC. — CSG-89-024-ML

Application for authority to modify and operate a five-meter C-band transmit-only temporary fixed earth station (Call Sign E890117) for the purpose of communicating with the Anik and Morelos satellite systems

TELECOM BROADCASTING, INC. — CSG-89-025-ML

Application for authority to modify and operate a five-meter C-band temporary fixed transmit/receive earth station (Call Sign E890128) for the purpose of communicating with the Anik and Morelos satellite systems

AVDATA SYSTEMS, INC. — CSG-89-026-ML, CSG-89-027-ML, CSG-89-028-ML

Applications for authority to modify 5.5-meter Ku-band earth station at Atlanta, Georgia and 1.8 and 2.4-meter Ku-band VSAT system licenses (Call Signs E881406, E881407 and E881408) to permit communication with all satellites that have been or will be consulted under Article XIV(d) of the INTELSAT Agreement

VITACOM SATELLITE SERVICES, CORPORATION — CSG-89-031-ML

Application for authority to modify its license for a 3.7-meter Ku-band domestic fixed satellite earth station at Mountain View, California (Call Sign E890138) to access all U.S. domestic satellites and Morelos I and II

CONUS COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — CSG-89-033-ML

Application for authority to modify and operate a five-meter Ku-band transmit/receive earth station (Call Sign E890142) at St. Paul, Minnesota for the provision of service in the United States and Canada

MICHIANA TELECASTING CORP. — CSG-89-034-ML

Application for authority to modify its 9.2-meter C-band domestic fixed earth station license at South Bend, Indiana, (Call Sign E4393) for the provision of transmit/receive service to Mexico and transmit-only service to the Caribbean and Latin America

CONUS COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — CSG-89-035-ML, CSG-89-036-ML

Application for authority to modify and operate a 2.4-meter and a 1.8-meter Ku-band temporary fixed satellite transmit earth station (Call Signs E890155 and E890156) for service between the United States and Canada

TELECOM BROADCASTING, INC. — CSG-89-040-ML

Application for authority to modify and operate a five-meter C-band transmit-only earth station (Call Sign E 7404) for the provision of transborder video services to points in Canada, Mexico, Central America and the Caribbean

HUGHES NETWORK SYSTEMS, INC. — CSG-89-044-ML

Application for authority to modify its 7.6-meter Ku-band hub earth station (Call Sign E881109) in Germantown, Maryland, and 1.2, 1.8 and 2.4-meter VSAT stations (Call Signs E881110, E881111 and E881112) to establish and operate channels of communications will all Ku-band satellites which have been or will be consulted under Article XIV(d) of the INTELSAT Agreement for transmissions between the United States and Canada and Latin America

WDIO-TV, INC. — CSG-89-045-ML

Application for authority to modify a 4.5-meter Ku-band fixed domestic transmit/receive earth station in Duluth, Minnesota as part of the Conus satellite newsgathering cooperative and to transmit and receive communications from various points in Canada via all U.S. domestic satellites and the Anik system

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: March 31, 1989; Released: April 18, 1989

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned applications requesting authority under Title III of the Communications Act of 1934, as amended, to modify existing domestic satellite earth station licenses or to construct new earth station facilities to provide satellite transborder services between the United States and Canada, Mexico, Latin America and the Caribbean. These applications were placed on the Commission's public notice. No comments were received.

THE APPLICATIONS

2. *Intelconsult Corporation (Intelconsult) (File No. CSG-89-019-P/L).* Intelconsult seeks authority to construct and operate a 2.4 meter Ku-band fixed transmit/receive VSAT earth station at Chula Vista, California, to communicate with the Morelos-I satellite for private, intra-corporate communications only.

3. *Cylix Communications Corporation (Cylix) (File Nos. CSG-89-020-ML, CSG-89-021-ML and CSG-89-022-ML.* Cylix is a licensee of 33 C-band earth stations, by which it has been providing data communication domestically since January 1987. Cylix also currently operates a point-to-multipoint VSAT network consisting of a 6.1-meter Ku-band hub station in Memphis, Tennessee, and up to 3,700 1.8 and 2.4-meter remote earth stations at various fixed locations throughout the United States. In the subject applications, Cylix seeks authority to modify its 1.8, 2.4 and 6.1-meter Ku-band VSAT earth stations (Call Signs E861022, E880915 and E873412) to include the Anik and Morelos satellite systems as points of communications to provide private, non-common carrier data services between the United States and Canada and Mexico via U.S., Anik and Morelos satellite systems consistent with consultations under Article XIV(d) of the INTELSAT Agreement.

4. *Overseas Telecommunications, Inc (OTI) (File No. CSG-89-023-ML).* OTI is an international common carrier that has been authorized to provide two-way audio, video and business services between the United States and Canada and Mexico via all U.S. domestic satellites and the Anik and Morelos satellites consistent with consultations under Article XIV(d) of the INTELSAT Agreement. In the subject application, OTI seeks authority to use its 4.6-meter and a 2.4-meter Ku-band fixed satellite earth station (Call Sign E881385) facilities at Irving, Texas, to communicate with all U.S. domestic satellites and the Anik and Morelos satellite systems. OTI proposes to operate the facilities on a common carrier basis to provide its customers with digital private line satellite transmission services for data, video and voice between the United States and Mexico.

5. *Telecom Broadcasting, Inc. (TBI) (File Nos. CSG-89-024-ML, CSG-89-025-ML and CSG-89-040-ML).* TBI has previously been authorized to modify domestic earth station licenses to provide transborder services. In the instant applications, TBI requests authority to modify its domestic licenses for three C-band transportable earth stations, a five-meter transmit-only, a five-meter transmit/receive and a five-meter transmit-only earth station (Call Signs E890117, E890128 and E7404) to establish and operate satellite channels of communication using the Morelos and Anik satellite systems and U.S. satellites that have been or will be coordinated with INTELSAT for the purpose of providing, on a non-common carrier basis, video service to Canada, Mexico, Central America and the Caribbean. TBI also requests authority to use the transmit-only facilities as well to receive video programming from Canada and Mexico.

6. *AvData Systems, Inc. (AvData) (File Nos. CSG-89-026-ML, CSG-89-027-ML and CSG-89-028-ML).* AvData is the licensee of a VSAT network system consisting of fixed Ku-band earth stations, including a 5.5-meter hub earth station at Atlanta, Georgia (Call Sign E881406) and multiple 1.8 and 2.4-meter small aperture earth stations (Call Signs E881407 and E881408, respectively). In the subject applications, AvData requests authority to modify its licenses for its VSAT system to permit it to communicate with all satellites that have been or will be consulted under Article XIV(d) of the INTELSAT Agreement to provide high-speed data and digitized voice transmissions to Canada and Mexico, as well as two-way service between the United States and Canada and the United States and Mexico. AvData states that it intends to use the VSAT satellite system to provide specialized network communications services to individual business customers on a private basis.

7. *Vitacom Satellite Services, Corporation (Vitacom) (File No. CSG-89-031-ML).* Vitacom has previously been authorized to provide transborder communications on a private, non-common carrier basis. In the instant application, Vitacom requests authority to modify its license for a 3.7-meter Ku-band domestic fixed satellite earth station at Mountain View, California (Call Sigh E890138) in order to access all U.S. domestic satellites and the Mexican Morelos I and II satellites. Vitacom states that grant of the requested authority will permit it to commence monitoring and control of a hub transmit/receive earth station at Atizipan, Mexico. The hub station that it will monitor is the primary transmit/receive earth station communicating with a network of earth stations located at various branches of the Instituto Tecnologico y de Estudios Superiores de Monterey, an institute of higher learning in Mexico.

8. *Conus Communications Company Limited Partnership (Conus) (File Nos. CSG-89-033-ML, CSG-89-035-ML and CSG-89-036-ML).* Conus is a limited partnership made up of television broadcasters and television news entities. Conus transmits programming such as news material to affiliated stations throughout the United States. Conus has previously been authorized to modify licenses for its domestic earth stations to provide transborder service between the United States and Canada. In application File No. CSG-89-033-ML, Conus seeks authority to modify its 5.5-meter Ku-band transmit/receive earth station (Call Sigh E890142) at St. Paul, Minnesota to provide video and related audio services between St. Paul, Minnesota and points in the United States and Canada via all U.S. domestic satellites and the Canadian Anik satellite system. Application File Nos. CSG-89-035-ML and CSG-89-036-ML request authority for Conus to use its 2.4 and 1.8-meter Ku-band temporary fixed transmit earth stations (Call Signs E890155 and E890156, respectively) to transmit to various points in the United States and Canada via all U.S. domestic satellites and Canada's Anik satellite system.

9. *Michiana Telecasting Corp. (Michiana) (File No. CSG-89-034-ML).* Michiana is the licensee of a 9.2-meter C-band domestic fixed transmit/receive earth station at South Bend, Indiana (Call Sign E 4393) which is used primarily for the transmission and/or reception of occasional video programming. Michiana's license for this earth station has previously been modified to permit transmissions to and from the Canadian Anik satellite system for service between the United States and Canada. In the instant application, Michiana seeks a further modification of its earth station license to permit it to utilize all domestic satellites that it is currently authorized to access and to add additional satellites (consulted pursuant to Article XIV(d) of the INTELSAT Agreement) as points of communication for the transmission and reception of occasional video programming between the United States and Canada and Mexico and the transmission of one-way occasional video programming to Latin American/Caribbean locations (*i.e.* receive-only).

10. *Hughes Network Systems, Inc. (HNS) (File No. CSG-89-044-ML).* HNS has previously been granted temporary authority to provide transborder services in connection with the operation of its VSAT hub earth station. In the instant application, HNS requests authority to modify its 7.6-meter Ku-band hub earth station (Call Sign E881109) in Germantown, Maryland and 1.2, 1.8 and 2.4-meter VSAT stations (Call Signs E881110, E881111 and E881112) to establish and operate channels of communication with all Ku-band satellites which have been or will be consulted under Article XIV of the INTELSAT Agreement to provide high-speed data, one-way video and digitized voice transmissions to or from Canada, Mexico, Latin America and the Caribbean countries as well as two-way services between the United States and Canada and Mexico consistent with existing consultations under Article XIV(d).

11. *WDIO - TV, Inc. (File No. CSG-89-045-ML).* WDIO is the licensee of WDIO-TV, Channel 10, Duluth, Minnesota and WIRT(TV), Channel 13, Hibbing, Minnesota. WDIO is also a member of the Conus satellite newsgathering cooperative. Conus has over eighty members, including television stations and television news entities, that use fixed Ku-band uplinks and transportable Ku-band satellite uplink vans for newsgathering and other purposes. The Conus members may be interconnected as a group to share news and other programming among themselves, or use their own transportable uplink vans individually to broadcast remote news and sports events to their respective viewing audiences as they occur anywhere in the United States WDIO uses its fixed domestic transmit/receive earth station in Duluth, Minnesota to transmit to and receive programming from the Conus control center in St. Paul, Minnesota. The earth station enables WDIO to receive the news or other programming from other Conus members via the Conus control center, and also provide Conus and its members with WDIO's news and other programs. In the instant application, WDIO requests authority to modify a 4.5-meter Ku-band earth station (Call Sign E890222) at Duluth, Minnesota to transmit and receive communications to and from various points in Canada via all U.S. domestic satellites and Canada's Anik satellite system.

DISCUSSION

12. In 1981, following consultations with the Department of State, the Commission gave initial approval for use of U.S. domestic satellites for the transmission of certain international telecommunications services to points within the footprint of those satellites. The Commission determined that domestic satellites could be used for these services where INTELSAT is incapable of providing a service or where it would be clearly uneconomical or impractical to use the INTELSAT system for that services. Based on these criteria, the Commis-

sion has authorized over 200 applications for transborder service between the United States and Canada, Mexico, Latin America and the Caribbean locations.

13. The subject applications are similar to previous applications granted under the Commission's Transborder policy. For the most part, the applications involve the modification of domestic earth station licenses to extend existing or planned domestic networks to provide business services between the United States and Canada and Mexico using U.S. domestic satellites as well the Anik and Morelos satellites. The remaining applications involve requests by entities previously authorized to provide transborder services to modify existing domestic earth stations to provide business and video services between the United States and Mexico, and Canada on a two-way basis and receive-only video to Latin American/Caribbean locations.[1] Under these circumstances, we conclude that a grant of the subject applications is consistent with the Commission's Transborder policy. The Commission has previously recognized that where the extension of existing domestic business networks is involved, use of the INTELSAT system would be both clearly impractical and uneconomical.[2] Specifically, the Commission has noted that maximum efficiency is gained through use of one satellite to link a customer's numerous business locations simultaneously. Use of the INTELSAT system would require the virtual duplication of a domestic network for each customer that wanted to add Canadian or Mexican business locations to its network. The same considerations also apply to the receive-only video services where the programming is already being transmitted throughout the United States and can be received in transborder locations on an incidental basis with the addition of a small, receive-only earth station for little or no additional cost.[3] In addition, the Commission has found that use of INTELSAT facilities in such circumstances would be an inefficient use of the available radio frequency spectrum.

14. Accordingly, IT IS ORDERED that the applications of Intelconsult (File No. CSG-89-019-P/L), Cylix (File Nos. CSG-89-020-ML, CSG-89-021-ML and CSG-89-022-ML), OTI (File No CSG-89-023-ML), TBI (File Nos. CSG-89-024-ML, CSG-89-025-ML and CSG-89-040-ML), AvData (File Nos. CSG-89-026-ML. CSG-89-027-ML. CSG-89-028-ML), Vitacom (File No. CSG-89-031-ML), Conus (File Nos. CSG-89-033-ML, CSG-89-035-ML and CSG-89-036-ML), Michiana (File No. CSG-89-034-ML), HNS (File No. CSG-89-044-ML), and WDIO (File No. CSG-89- 045-ML), ARE GRANTED and the applicants are authorized to provide the transborder services requested in their applications consistent with Attachments 1 and 2.

15. It is FURTHER ORDERED that Intelconsult (File No. CSG-89-019-P/L) is authorized to construct a 2.4-meter Ku-band fixed transmit/receive earth station at Chula Vista, California. However, Intelconsult is limited to the provision of intra-corporate communications between its offices in San Diego, California and Mexico City, Mexico and Intelconsult shall not offer any public common carrier services, consistent with the provisions of Section 310(b), 47 U.S.C. 310(b).

16. This authorization constitutes the final step with respect to the provision of transborder services only insofar as the U.S. regulatory process is concerned. It does not, however, dispense with any requirements that may be imposed by other countries involved.

17. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained.

18. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.15 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

ATTACHMENT 1

U. S. Satellites Consulted Pursuant to Article XIV (d)

Satellites
*FEDEX A
*FEDEX B
GALAXY I
*GALAXY II
GALAXY III
*GALAXY IV
*GALAXY B
GSTAR I
GSTAR II
*GSTAR III
*COMSTAR III
COMSTAR D-4
*COMSAT GEN B
SPACENET I
*SPACENET II
SPACENET III
SATCOM IR
*SATCOM IIR
SATCOM IIIR
SATCOM IV
SATCOM V
SATCOM K-1
*SATCOM K-2
SBS V
SBS I
SBS II
SBS III
**SBS IV
TELSTAR 3A
TELSTAR 302
*TELSTAR 303
CONTEL ASC-I
CONTEL ASC-II
WESTAR IV

WESTAR V
*WESTAR B
*WESTAR (79^0 W)

* Consulted for Latin America/Caribbean services only. Includes receive-only video programming from the U.S. to Mexico.

** Consulted for Canada and Latin America/Caribbean services only.

ATTACHMENT 2

SUMMARY OF INTELSAT CONSULTATION

Country	Service(s)	Satellite (s)
Anguilla	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Antigua and Barbuda	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bahamas	T.V., audio and data receive-only	all satellites listed in Attachment 1
Barbados	T.V. receive-only	all Galaxy, Satcom and Westar satellites listed in Attachment 1
Belize	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bermuda	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
British Virgin Islands	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Canada	occasional pt.-to-pt. and full time video services and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus ANIK B, C1, C2, C3, D1 and D2
Cayman Islands	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Colombia	T.V. receive-only	Galaxy I and III, Satcom IR, IIIR, IV and V, Westar IV, Westar V and Westar (269E)
Costa Rica	T.V. receive-only	all satellites listed in Attachment 1
Dominica	T.V., audio and data receive-only	all satellites listed in Attachment 1
Dominican Republic	T.V., audio and data receive-only	all satellites listed in Attachment 1
El Salvador	T.V. receive-only	all satellites listed in Attachment 1
Grenada	T.V., audio and data receive-only	all satellites listed in Attachment 1
Guatemala	T.V. and audio receive-only	all satellites listed in Attachment 1
Haiti	T.V., audio and data receive-only	all satellites listed in Attachment 1
Honduras	T.V. receive-only	all satellites listed in Attachment 1
Jamaica receive-only	T.V., audio and data (See note 3)	all satellites listed in Attachment 1
Mexico	Full-time and occasional T.V. services, receive-only audio and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus the Morelos I and II satellites
Monsterrat	T.V., and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Netherlands Antilles	T.V. receive-only	Galaxy I, Satcom III-R and IV, Westar IV and V and Comstar D4
Panama	T.V., audio and data receive-only	all satellites listed in Attachment 1
St. Christopher-Nevis	T.V., audio and data receive-only	all satellites listed in Attachment 1
St. Lucia	T.V., audio and data receive-only	all satellites listed in Attachment 1
St. Vincent and the Grenadines	T.V., audio and data receive-only	all satellites listed in Attachment 1
Trinidad and Tobago	T.V. receive-only	all Galaxy, Satcom, Westar and Comstar satellites listed in Attachment 1
Turks & Caicos	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Venezuela	T.V. receive-only	all satellites listed in Attachment 1

Notes

1) With the exception of Mexico and Canada, which were consulted separately, all services (*i.e.* T.V., audio and data receive-only) can be provided to any point over any of the satellites listed in Attachment 1 even through only certain services and satellites were initially requested. This can be accomplished though notifying INTELSAT with no additional consultation required.

2) Attachment 1 contains only those satellites that have been technically consulted with INTELSAT.

3) All services authorized to Latin American/Caribbean locations are receive-only (*i.e.* can be received as a by-product of or incidental to U.S. domestic transmissions).

FOOTNOTES

[1] The use of the term "two-way" in the context of video service between the U.S. and Canada and Mexico means that service may originate in either the U.S. or Canada and Mexico.

[2] Satellite Business Systems, 88 FCC 2d 195 (1981).

[3] Transborder Satellite Video Services, 88 FCC 2d 258 (1981). The same considerations are applicable where Canadian and Mexican domestic video services are received in the U.S.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 12, 1989

CHAIRMAN PATRICK NAMES NEW MEMBERS TO ADVANCED TELEVISION SERVICE ADVISORY COMMITTEE

FCC Chairman Dennis R. Patrick has announced his appointment of four new members to the FCC Advisory Committee on Advanced Television Service. Donald F. Johnstone has replaced Daniel F. Minihan, Richard D. Roberts has replaced Trygve Myhren, Melvin Harris has replaced Robert Daly and James C. McKinney has replaced E. William Henry.

The addresses and telephone numbers of these new members are as follows:

Donald F. Johnstone
President and CEO
Philips Consumer Electronics
1 Philips Drive
Knoxville, TN 37914
(615) 521-4305

Richard D. Roberts
President and CEO
TeleCable Corporation
740 Duke Street
Norfolk, VA 23510
(804) 624-5000

Melvin W. Harris
President, Television Group
Paramount Pictures Corporation
5555 Melrose Avenue
Los Angeles, CA 90038
(213) 468-5000

James C. McKinney
Chairman
Advanced Television Systems Committee (ATSC)
1771 N Street, N.W.
Washington, DC 20036-2898
(202) 429-5345

The next meeting of the Advisory Committee will be held on April 17, 1989, at 2:00 p.m., in Room 856 of 1919 M Street, N.W.

Any questions regarding this meeting should be directed to Advisory Committee Chairman Richard E. Wiley at (202) 429-7010 or Alex D. Felker at (202) 632-6460.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-84

In re Applications of

POSEY COUNTY BROADCASTING CORP.	File No. BPH-861023MD
SOUTHERN INDIANA BROADCASTING	File No. BPH-861126MP

For Construction Permit for a
New FM Station on Channel 294A
in Mount Vernon, Indiana

Appearances

John M. Shoreman, on behalf of Southern Indiana Broadcasting, Ltd., *Harry C. Martin* and *Cheryl A. Kenny*, on behalf of Posey County Broadcasting Co., Inc. and *Charles Dziedzic*, on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: March 16, 1989; Released: April 17, 1989

PRELIMINARY STATEMENT

1. This proceeding involves the mutually-exclusive applications of Posey County Broadcasting Corp. (Posey) and Southern Indiana Broadcasting, Ltd. (Southern) for a construction permit for a new FM station to be operated on Channel 294A at Mt. Vernon, Indiana.

2. By *Hearing Designation Order*, 53 Fed. Reg. 8974, published March 18, 1988, (*HDO*), [1] the above-filed applications were designated for hearing on the following issues:

> To determine which of the proposals would, on a comparative basis, better serve the public interest.
>
> To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if any.

3. A prehearing conference was held on May 11, 1988. Hearing sessions were held October 4-6, 1988. Proposed Findings and Conclusions of Law were filed on November 21, 1988, and Replies thereto on December 19, 1988.

FINDINGS OF FACT

Posey County Broadcasting Corp.

4. Posey is an Indiana corporation. Ann M. Nussel is the President, director and 51 percent voting shareholder of Posey (Posey Ex. 2). Bill A. Nussel, the spouse of Ann Nussel, is Vice President, Secretary, Director and 49 percent voting stockholder. There are no other officers, directors or stockholders (Posey Ex. 2, p. 1; Posey Ex. 3, p. 1). At one time, 1 percent of Posey was held by a Mary Cashion (Tr. 17); however, she relinquished her interest just a short time after purchase of WPCO in July 1983 (Tr. 17-18).

5. Posey is the licensee of Standard Broadcast Station WPCO, Mt. Vernon, Indiana (Posey Ex. 1). In a Statement for the Record, filed April 6, 1988, Posey requested a "daytimer" preference pledging to divest WPCO within three years after commencement of its Mt. Vernon FM operation (*Id.*). Aside from its interest in WPCO, neither Posey nor its principals has any other interest in or connection with any other medium of mass communications (Posey Ex. 4).

6. Ann Nussel proposes to work full time, a minimum of 40 hours per week at the proposed Mt. Vernon FM station as its general manager. In that position, she will have responsibility for overall supervision of the station. Her particular emphasis will be upon the business and financial affairs of the station. Mrs. Nussel will prepare budgets, projections financial statements and reports and will supervise bookkeeping and accounting. She will also be responsible for implementing and administering the station's equal employment opportunity program (Posey Ex. 2, p. 1). In the event Posey receives a grant of the construction permit, WPCO's present station manager, Mr Grogg, will become the station manager of both the AM and FM operations.

7. Mrs. Nussel is a white female. She has lived in the Mt. Vernon area since 1961. From 1961 to 1971, she resided within the Mt. Vernon city limits. Since 1971 she has resided just outside the city limits. Mrs. Nussel plans to continue residing at her present address while working at the proposed FM station (*Id.*).

8. Mrs. Nussel has been involved in various community activities in Mt. Vernon and the surrounding area ever since 1960 (Posey Ex. 2, pp. 1-2).

9. Mrs. Nussel averred in Posey's direct case (Posey Ex. 2) that she has been WPCO's full-time general manager ever since Posey had purchased this station in 1983. But in its direct case Posey did not supply any specifics as to Mrs. Nussel's activities as WPCO's general manager for the time period since 1983. On cross-examination of Mrs. Nussel it was learned that WPCO has utilized the services of a full-time broadcast manager since September, 1983 (Tr. 56, 193-194). WPCO station manager's supervision extends over the news department (Tr. 157) and he shares with Mrs. Nussel supervision over WPCO's sole clerical employee (Tr. 116, 157). He also coordinates with Mrs. Nussel and supervises the sales staff (Tr. 87); is responsible for production matters at the station (Tr. 135); shares authority with Mrs. Nussel to sign paychecks of all WPCO employees (Tr. 86); helps to interview prospective employees (Tr. 118); and also participates in preparing the station's budget (Tr. 99).

10. The present station manager, Richard Grogg, had made official filings with the FCC in WPCO's behalf (Southern Ex. 6, 7, 8). In one instance he made reference to himself as WPCO's general manager (Tr. 57-58; Southern Ex. 6), Mrs. Nussel never gave him authority to claim that title and the reference was in error (Tr. 82, 139). Mr. Grogg also is one of the station staff members who represent WPCO at local business gatherings (Tr. 185).

11. Upon re-direct examination Mrs. Nussel was asked to state her normal range of duties. She responded that she supervises personnel, meets with Mr. Grogg on production problems and supervises "payables, account receivables; sales" (Tr. 138). She develops sales packages (Tr. 87). She also hires and fires employees and sets salaries (Tr. 137). At her deposition Mrs. Nussel testified that she did not hire or enter into contracts with the station's on- air personalities (Tr. 105). Mrs. Nussel also testified that she has made decisions regarding the hiring of employees, the approval of promotional packages, and the approval of sales packages on her own without discussing those matters with her husband (Tr. 138).

12. Mrs. Nussel has a private office at the station although it is not equipped with a phone (Tr. 83-84). She has a phone at the desk which she uses in the sales room, but sales employees have access to it as well (Tr. 140-41). There are three persons on the sales staff besides Mrs. Nussel (Tr. 84, 99). Mrs. Nussel does not draw a salary (Tr. 96).

13. On cross-examination Mrs. Nussel could not recall when she became president of Posey (Tr. 18), but she knew that it was before looking into the availability of an FM station in Mt. Vernon (Tr. 29). In this connection she hired an engineer to look into the possible allocation of assignment of an FM station to Mt. Vernon (Tr. 28). Mrs. Nussel also obtained some of the maps utilized in the FM search (Tr. 193).

14. Also on cross-examination Mrs. Nussel initially could not recall whether WPCO had ever filed comments with the Commission requesting an increase in its service hours (Tr. 116), but after reviewing a copy of the actual comments that WPCO had filed on this subject, she remembered that she had asked Mr. Grogg to write a letter to that effect (Tr. 117). Mrs. Nussel further testified that she and Mr. Grogg had drafted the EEO program placed in WPCO's public file on August 8, 1988, but she could not recall whether the source of the EEO information came from Posey's communications counsel or the National Association of Broadcasters (Tr. 162-163).

15. Posey also proposes that Bill A. Nussel will work at the Mt. Vernon FM station on a full-time basis, a minimum of 40 hours per week. He will be the station's operations manager. In that position, Mr. Nussel will supervise all technical personnel and board operators. He also will design and, on a daily basis, ensure the proper functioning of the FM station's physical plant. Mr. Nussel will terminate his current employment as an electrical engineering technician at General Electric in order to effectuate his integration pledge (Posey Ex. 3).

16. Mr. Nussel has resided within Mt. Vernon's city limits for 36 years until 1971. Since 1971 he has resided just outside the city limits and he plans to continue residing there while working at the proposed Mt. Vernon FM station (*Id.*).

17. Bill Nussel has been involved in community activities in Mt. Vernon and the surrounding area for many years (Posey Ex. 3).

18. Since July 1983, Mr. Nussel has devoted 20-40 hours per week at the station as its operations manager. Until Posey divests WPCO, Mr. Nussel will continue to be operations manager for WPCO, as well as the FM station. He anticipates there will be an overlap in overseeing both stations' technical operations (*Id.*).

19. Mr. Nussel has stated that he has been present at WPCO every weekday evening and on Saturdays from 8:00 a.m. to 6:00 p.m. (Tr. 170-71). Mr. Nussel has been employed by General Electric for the last 28 years (Tr. 172). He finishes work at General Electric at 5 o'clock in the evening and gets to WPCO around 5:30 p.m. He meets with Mr. Grogg every day to discuss possible problems, including any operating quality concerns (Tr. 172). At the station he has been responsible for the maintenance of the physical plant (Tr. 169). According to him, this involves "changing needles," "keeping the equipment operating." (Tr. 169). Mrs. Nussel described Mr. Nussel's duties as covering "[a]ny technical or equipment maintenance and technical work." (Tr. 98, 99). Mr. Nussel supervises two part-time contract engineers (Tr. 169). Mr. Nussel does not draw a salary (Tr. 107). He has been involved in decisions to hire and fire personnel (Tr. 122, 138, 148, 194). He also participates in preparing the budget (Tr. 99).

20. Mr. Nussel certified to the availability of Posey's proposed site (Tr. 177). Mr. Nussel also prepared the first six pages of FCC Form 301 (Tr. 175). Mr. Nussel had stated that he, in conjunction with his wife, determined that Posey could certify that it was financially qualified to construct and operate the station (Tr. 180). Mr. Nussel prepared cost estimates prior to preparing Posey's application (Tr. 181). A routinely prepared "monthly summary analysis" of both corporate and personal assets was utilized to determine what assets were currently available (197-198).

21. Mr. Nussel recalls that Posey's communications counsel routinely mails pleadings to his attention (Tr. 186). Mr. Nussel maintains a file which contains documents relevant to the prosecution of Posey's case (Tr. 186). Mr. Nussel has occasionally asked Mr. Grogg to review pleadings that have been filed in this proceeding (Tr. 187).

22. *Auxiliary Power Proposal.* Posey proposes to establish an auxiliary power generator to provide power in the event of interruption of regular electrical service (Posey Ex. 5).

Southern Indiana Broadcasting, Ltd.

23. Southern is a limited partnership existing under the laws of Indiana (Southern Ex. 1). Ms. Phyllis Johnson is the sole general partner of Southern (*Id.*). McFadden Communications Corporation (MCC) is the sole limited partner (*Id.*). Douglas B. McFadden is the president and principal stockholder of MCC (*Id.*). Southern's limited partnership agreement was executed on January 14, 1986 (*Id.*). The equity interests are 15 percent for Ms. Johnson and 85 percent for MCC (*Id.*). The initial contributions are to be $500 and $5,000, respectively (Posey Ex. 19).

24. Mr. McFadden is the originator of this business venture (Tr. 292). Mr. McFadden is the founding and senior partner of McFadden, Evans & Sill, a communica-

tions law firm in Washington, D.C. (Tr. 417, 500). Southern is represented by John Shoreman, Esq. a member of McFadden, Evans & Sill (Tr. 331, 413). Donald J. Evans, McFadden's law partner, is a director of MCC; William J. Sill, another McFadden partner, prepared MCC's articles of incorporation and John Shoreman was MCC's sole incorporator (Posey Exs. 16, 17, p. 5; Tr. 513).

25. Negotiations leading to Southern's formation occurred in December of 1985 (Tr. 294-295); Southern Ex. 1). It was Mr. McFadden who recruited Ms. Johnson for the Mt. Vernon application (Tr. 292). Ms. Johnson has known Mr. McFadden since their days in school together during the 1950's. Mr. McFadden was raised in Mt. Vernon (Tr. 532) and visits the area two or three times a year (Tr. 413; 532). Although Ms. Johnson has no broadcast experience, Mr. McFadden chose to invest with Ms. Johnson because of their long standing mutual acquaintance and his deep regard for her ability and integrity (Tr. 546).

26. After Ms. Johnson received the initial draft of Southern's proposed limited partnership agreement in December, 1985 (Tr. 295; Posey Ex. 8), she consulted with her personal attorney, David Givens (Tr. 298, 389). She then requested certain revisions to the proposed limited partnership agreement (Tr. 298, 299). Again, having received the final revised draft of the proposed limited partnership agreement, she consulted with her personal attorney (Tr. 304-305), 391). Mr. Givens was retained as Southern's attorney by Ms. Johnson because of the personal services that he has provided to Ms. Johnson in the past (Tr. 388-89). Mr. Givens also has an attorney-client relationship with McFadden (Tr. 414).

27. In consideration for her interest in Southern, Ms. Johnson has contributed her time and efforts and made a commitment to assume all the liabilities of the partnership (Tr. 538, 313). Ms. Johnson has never been told that she does not have to make an initial capital contribution (Tr. 313). In fact, she believes she is obligated to tender an initial capital contribution (Tr. 313).

28. Ms. Johnson participated in the preparation of Southern's application (Tr. 332, 333, 335). She certified to Southern's financial qualifications after she reviewed the bank's financial commitment letter and after consulting with her attorney (Tr. 337, 402-403). She had previously received cost estimates from both her attorney and her engineer (Tr. 342). Ms. Johnson participated in the preparation of Southern's Program Service Statement (Tr. 357).

29. Ms. Johnson spoke to Mr. McFadden shortly after Southern's application was filed, but since that time, Ms. Johnson and Mr. McFadden have had only one brief conversation (Tr. 548). Since the filing of Southern's application, Ms. Johnson has maintained a copy of all pleadings that have been filed in the proceeding (Tr. 238-239). Ms. Johnson participated in the preparation of Southern's Integration and Diversification Statement (Tr. 364- 365).

30. Ms. Johnson receives all of Southern's bills (Tr. 317). She intends to make a capital call on Southern's limited partner to pay past due bills (Tr. 317; 393). She also maintains Southern's bank statements (Tr. 322).

31. Mr. McFadden was able to assist Ms. Johnson by initially retaining the engineer (Tr. 358) and contacting the owner of Southern's proposed transmitter site (Tr. 539-540). Southern's engineer had recommended a general area for the site; Mr. McFadden approached the landowner because he was acquainted with him and Ms. Johnson was not (Tr. 373, 539-540). David Givens, Southern's local attorney, later played a role in negotiating a site letter (Tr. 408). MCC has provided pre- and post-grant financing (Tr. 538). Mr. McFadden opened MCC's bank account (Tr. 415). Mr. Shoreman drew up Southern's public file (Posey Ex. 12; Tr. 371), arranged for publication of notices (Tr.370) and prepared Southern's integration and diversification statement (Tr. 365).

32. Ms. Johnson proposes to work full-time (not less than 40 hours per week) as the general manager of the proposed station (Southern Ex. 2, Tr. 378). Ms. Johnson will oversee and be responsible for all aspects of the proposed station's operations (Southern Ex. 2). She will hire and supervise all employees at the station (Tr. 379, 406). Ms. Johnson will oversee the construction and start-up of the facilities (Tr. 382). She will resign from her present employment to perform her duties as general manager of the proposed station (Southern Ex. 2).

33. The provisions of Southern's limited partnership agreement prohibit the limited partner MCC's involvement in the day-to-day operations of the proposed broadcast facility (Southern Ex. 1, Attachment A).

34. Ms. Johnson is a Black female (Southern Ex. 2). She is a life- long resident of Mt. Vernon and an active participant in community affairs (*Id.*). In 1982 Ms. Johnson was a candidate for the Mt. Vernon School Board (*Id.*). In addition, she has been actively involved as a volunteer for the following local school programs: President and Vice President of "Mama and Papa" (1979-1980), an organization responsible for raising funds for local school sporting activities; member of Alexander and Anne Bolger Scholarship Committee (1980 to present); contributing member of the Mt. Vernon High School Building Corporation (1985- to present); member of the Board of Directors of the Susanna Wesley Nursing School (1980-1981); member of the Board of Directors of the "Band Booster" organization (1982-1983); and Program Chairman, Hedges Central PTA (1968-1969) (*Id.*).

35. Additionally, Ms. Johnson has served her community as a volunteer to the Big Brothers/Big Sisters program. She was a Brownie Den Mother (1971- 1972), and an assistant Brownie leader (1973). Ms. Johnson was the superintendant and a teacher of Freewill Baptist Sunday School. She has been a member of the Kitchen Committee of Freewill Baptist Church for the past ten years and has recently performed the same services at the local Methodist Church (1987-1988) (*Id.*).

36. Neither Southern nor any of its principals have any attributable interest in any medium of mass communication (Southern Ex. 3).

37. Southern proposes to install auxiliary power facilities to maintain operating during power failures (Southern Ex. 4).

CONCLUSIONS OF LAW

Posey County Broadcasting Corp.

38. *Daytimer Preference.* The Commission has set down the following conditions which an applicant such as Posey herein has to meet before it can be awarded a daytimer preference.

(i) The FM allotment applied for must be in the same community as the daytime only station;

(ii) The applicant must have owned the daytime-only facility for three continuous years prior to the filing of its FM application;

(iii) The daytime-only applicant must pledge to divest the AM facility within three years after the commencement date of FM operations. This pledge is required to be made within 30 days after designation of the FM application for hearing;

(iv) Members of the applicant entity holding cognizable ownership interests must have spent more than 20 hours per week (either individually on in the aggregate) participating in the management of the daytime-only facility during the three year period prior to filing the FM application; and

(v) The applicant must propose to be integrated in the operation of the FM station.

See Second Report and Order, 101 FCC 2d 638 at 644, 646-47, 57 RR 2d 1607 at 1611-13 (1985), *recon. denied and decision clarified*, 61 RR 2d 1704 (1987), *aff'd* 822 F2d 277 (2nd Cir. 1988).

39. A review of the record indicates that Posey has met the above- stated conditions and is entitled to a daytimer preference. Its daytime AM station,[2] WPCO, is licensed to Mt. Vernon, Indiana, the same community to which the currently-sought FM facility is allocated. Posey has operated station WPCO since July of 1983, which is more than three years prior to October 23, 1986, the filing date of its FM application. Posey has pledged to divest its interest in WPCO(AM) within three years after commencement of FM operations if its application herein is granted. Posey's pledge of divestiture was made on April 6, 1988, *i.e.*, within 30 days after the release of the *HDO*. Further, Posey's owners, Ann and Bill Nussel, have participated in WPCO's management more than 20 hours per week during the three year period prior to the filing of Posey's FM application, and both pledge full-time integration into the operation of the FM station.

40. Southern does not challenge the amount of time Ann and Bill Nussel have spent at the WPCO station but protests that they have not worked in roles normally associated with the phrase "supervisory personnel." Southern maintains that the tasks performed by the Nussels were ministerial, merely functionary, which do not rise to the level of a "managing owner" thereby undermining their claim of substantial participation in management. The record, however, indicates that although Ann and Bill Nussel performed some ministerial tasks, they also have been "hands on" owners. (*See* Findings Nos. 11, 13, 14, 19 and 20.) The fact that they also take part in some non-management activities does not render their management status uncreditable. Commission precedent holds that integration proposals of individuals occupying management roles are not discredited or diminished where some of their time may be spend in otherwise non-management activities. [3] *Tulsa Broadcasting Company*, 2 FCC Rcd 6124, 6128, 68 RR 2d 457, 463 (Rev. Bd. 1988), *rev. denied*, FCC 88-232 (July 26, 1988). *See also Vela Broadcasting, Inc.*, 2 FCC Rcd 3663, 3667, 63 RR 2d 1166, 1173 (Rev. Bd. 1987); *Voce Intersectario Verdad America, Inc.*, 100 FCC 2d 1607, 1616-17, 58 RR 2d 445, 452 (Rev. Bd. 1985); *Debra Carrigan*, 100 FCC 2d 721, 738, 58 RR 2d 96, 109 (Rev. Bd. 1985), *aff'd* 830 F2d 1188 (D.C. Cir. 1987). No significance is attached to the fact that Mrs. Nussel does not have a phone in her private office. The record is clear that Mrs. Nussel has been an active full-time participant in the day-to-day management of WPCO since its inception and that Mr. Nussel has been actively involved on a part-time basis in WPCO's day-to-day management.

41. The daytimer preference awarded to Posey upgrades its value of past broadcast experience to the same level as minority ownership or local residence. *See Memorandum Opinion and Order*, FCC 86-76, 59 RR 2d 1221, 1222 (1986).

42. Posey is entitled to 100 percent full-time integration credit for its proposal to integrate both Ann and Bill Nussel into management positions at the proposed FM station. Southern argues against any integration credit for Ann Nussel because she lacked any meaningful participation in the preparation and prosecution of Posey's application. But her past performance indicates that she can and likely will perform in the same manner in the future. Furthermore, the record does reflect her involvement in the application process herein. Southern would also deny Bill Nussel's claim to integration or the basis that his job is non-management level and because he has not specified any arrangement for the management of the rental properties owned by the Nussels. However, Southern has not shown whether the management of the rental properties would interfere in the Bill Nussel's day-to-day management and, further, it has been noted in footnote 3 that Bill Nussel's present and prospective position is entitled to integration credit.

43. Posey's integration proposal is substantially enhanced by 100 percent long term residence within the community of license and within the service area, coupled with civic participation.

44. Posey's integration proposal also is due moderate enhancement for Mrs. Nussel's 51 percent female integration.

45. Posey is entitled to an additional slight credit for its auxiliary power proposal.

46. Neither Posey nor its principals have interests in media other than WPCO. Since Posey timely proposed to divest its interest in WPCO, no diversification demerit will be assigned.

Southern Indiana Broadcasting Co.

47. Southern seeks 100 percent quantitative integration credit for the proposed integration of Phyllis Johnson, its 15 percent sole general partner. Posey contends that Southern's proposal should not be credited because it is a sham proposal. Posey states that Southern is controlled by its limited partner, MCC, and by MCC's principal, Douglas B. McFadden, communications attorney, whose firm serves as Southern's communications counsel.

48. The record reflects that MCC, Southern's limited partner, will provide prosecution costs, hired the engineer and arranged for the use of the proposed transmitter site; arranged for the bank commitment letter; opened the partnership's bank account, drafted the partnership agreement, and a member of McFadden's law firm, John M. Shoreman, drafted the application, drafted the integration statement, set up Southern's public file and arranged for publication of local notices.

49. Southern argues that its limited partner's involvement in organization and financing did not go beyond that which the Commission found permissible in *Victory Media, Inc.*, 3 FCC Rcd 2073 (1988). However, the distin-

guishing feature between the instant case and that of *Victory Media, Inc.* is that MCC's principal, McFadden, is also Southern's legal representative.[4] In *Clarification on Ownership Attribution*, 1 FCC Rcd 802, 804, 61 RR 2d 739, 747-48 (1986), the Commission held that "the equity interest of limited partners who provide legal representation and counsel to the partnership is attributable" for comparative purposes to the applicant. *See also Mark L. Wodlinger*, 3 FCC Rcd 3139, 3141, 64 RR 2d 1645, 1648-49 (Rev. Bd. 1988). The record reflects that the law firm of McFadden Evans & Sill of whom Douglas McFadden is the founding and senior partner, has represented Southern throughout the proceeding. Thus, as a matter of law, MCC must be considered to be an "active" principal and its 85 percent equity interest is attributable to Southern under the comparative integration criteria.[5] Southern then is limited to a maximum quantitative integration credit of 15 percent for Johnson's proposed integration.

50. Southern's 15 percent integration credit is enhanced by Johnson's local residence, civic involvement, and her female and minority status. Southern also is credited for its proposal to install auxiliary power.

ULTIMATE CONCLUSION

51. Posey is the winner. The difference in quantitative integration credit between Posey and Southern (100 percent versus 15 percent) is sufficiently clear to make Posey the comparative winner on the basis of quantitative integration alone.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application of Posey County Broadcasting Corp. (File No. BPH-861023MD) IS GRANTED, and the application of Southern Indiana Broadcasting (File No. BPH-861126MP) IS DENIED.[6]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

FOOTNOTES

[1] Paragraph 4 of the *HDO* noted a possible comparative coverage issue. The applicants stipulated that significant differences in the proposed areas and population to be served do not exist. *See* , Joint Exhibit No. 1.

[2] WPCO(AM) operates with only 35 watts at night. Therefore, it is considered a daytime station. *See Memorandum Opinion and Order*, FCC 86-76, 59 RR 2d 1224, 1227, n. 27 (station with nighttime power of less than 250 watts is considered daytimer eligible for daytimer preference).

[3] Supervision of a station's technical operations, as done by Bill Nussel is an important position entitled to full integration credit, *see Nelson Broadcasting Co.*, 3 FCC Rcd 84, 88, 67 RR 2d 146, 153 (Rev. Bd. 1986).

[4] Although *Victory Media* Inc. involves a lawyer/passive investor, the applicant in *Victory Media Inc.* hired outside counsel.

[5] Some small percentage of Southern's ownership is held by Douglas McFadden's daughter, but the exact amount has not been established on the record.

[6] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

COMMUNITY BROADCASTING OF COASTAL BEND, INC. File No. BRCT-880331KN

For Renewal of License of Station
KAVU-TV, Victoria, Texas

RICHARD LEE FRENCH File No. BPCT-880701KE

For Construction Permit for New
Commercial Television Station to
Operate on Channel 25, Victoria, Texas

MEMORANDUM OPINION AND ORDER

Adopted: April 7, 1989; Released: April 14, 1989

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it for consideration: (a) the December 27, 1988, staff actions granting the above-captioned application of Community Broadcasting of Coastal Bend, Inc. (Coastal) for renewal of its license for Station KAVU-TV, Channel 25, Victoria, Texas, and dismissing the above-captioned mutually exclusive competing application of Richard Lee French (French) for the channel; (b) French's January 5, 1989, petition for reconsideration of those actions;[1] and (c) related pleadings.

BACKGROUND

2. By way of background, on December 12, 1985, Coastal and French entered into a management contract, whereby French would be hired as General Manager of the station. Section 6.03 of that contract provides, in part:

> *Restrictive Covenant.* Manager covenants and agrees as follows: Upon termination of his employment, unless said termination is without cause, Manager shall not, directly or indirectly, within the Area of Dominant Influence, as defined by Arbitron, of KAVU-TV, including, but not limited to, Victoria and such other counties as may be included in the area of Dominant Influence at the date of termination of employment, enter into or engage generally in direct competition with the Employer (Coastal) in the business of television broadcasting . . . for a period of three (3) years after the date of termination of his employment hereunder. . . . If said termination is without cause, the length of said covenant will be reduced to six (6) months.

3. On March 31, 1988, Coastal filed its application for renewal of license for the station. On May 14, 1988, Coastal terminated French's employment after he allegedly "failed to comply with the terms of the Management Contract" and "abandoned his responsibilities thereunder." On June 30, 1988, Coastal filed a petition in the Texas District Court for declaratory judgment against French to the effect that Coastal had fully satisfied all its obligations under the Management Contract, and that matter is still pending before the Court. The following day, on July 1, 1988, French filed his above-captioned application in competition with Coastal's renewal application. On August 29, 1988, Coastal, arguing that French's application was a violation of the non-competition clause of the Management Contract, sought temporary and permanent injunctions against French in the Texas District Court. Specifically, Coastal represented that the pendency of French's application frustrated the licensee's efforts to transfer the license to the First Victoria National Bank (Bank).[2] Consequently, Coastal asked the Court to order French not to take any further action with respect to his application, except to withdraw it.

4. On September 8, 1988, the Texas District Court issued an Order finding in favor of Coastal. In so doing, the Court found that the licensee would probably prevail on the merits of its June 30 petition for declaratory judgment and that French's above-captioned application violated the non-competition clause of his Management Contract. The court further concluded that the pendency of that application would interfere with the proposed transfer of the license, would delay the approval of Coastal's renewal application, and might cause Coastal to lose its license and cause it to "suffer financial hardship and/or ruin. "Consequently, the Court ordered French to "desist and refrain" from taking any further action on his application and from filing any additional applications or other documents with the Commission that may relate to Station KAVU-TV. Additionally, the Court ordered French to withdraw his application and to "cease and refrain" from taking any action to interfere with the transfer of Coastal's license to the Bank. That same day, counsel for French sent a letter to the District Court Judge objecting to the breadth of his Order, and, on September 13, 1988, he asked the Texas Court of Appeals to stay or suspend the temporary injunction issued by the District Court.

5. On September 16, 1988, French asked the Commission to dismiss his application for a construction permit, and he stated that he had no objection to grant of Coastal's renewal application. Consequently, on December 27, 1988, the Commission, by separate letters, dismissed French's construction permit application and granted Coastal's renewal application. On January 3, 1989, however, the Commission received a telegram from French, in which he stated:

> Please be advised that my letter of September 15, 1988, withdrawing my application was filed only under duress and threat of imprisonment. I request reconsideration of dismissal of my application, its reinstatement, and processing for hearing with the renewal application for KAVU-TV.

On January 5, 1989, he followed the telegram with a formal petition for reconsideration of the Commission's actions. In support of his petition, he argues that the

actions of Coastal are violative of Section 311 of the Communications Act of 1934, as amended, and of Section 73.3525 of the Commission Rules, and that the licensee's actions in that regard raise substantial questions about Coastal's basic qualifications to be a licensee. He further contends that the Commission was obliged, pursuant to Section 311(d)(3) of the Act, to make a determination that the withdrawal of his competing application was in the public interest. French also maintains that his September 15, 1988, request for dismissal of his application was contingent on a final determination rendered by the courts. Additionally, he asserts that the Commission should not consider the state court decree to be one for contract enforcement. Rather, he maintains that the issue is whether the Commission or a state court is the appropriate body to determine who can apply for a broadcast station. Moreover, French contends that his application does not interfere with Coastal's right to conduct its business during its duly authorized license term. Instead, he states that he only challenges Coastal's right to continue broadcasting. Finally, French argues that allowing the December 27 actions to stand would deny the Commission the right to choose between two applicants.

6. In opposition, Coastal argues that the Commission will defer to a state court's determination of private contractual rights, "even where the effect of the *lex loci* is to preclude the prosecution of a competing broadcast application by a local entity." *Hanover Radio, Inc.*, 52 RR2d 403, 405 (Rev. Bd. 1982), *aff'd sub nom. Ninety - Two Point Seven Broadcasting, Inc.*, 55 RR2d 607 (1984),[3] which, in turn, cited *Raul Santiago Roman*, 4 RR2d 175, *recon. denied*, 38 FCC2d 619 (Rev. Bd. 1965). Coastal further asserts that, if an applicant is required under state law to take a certain action, the Commission expects that it will abide by that law. *Hanover Radio, Inc., supra* at p. 406, *citing Uniform Policy on Violation of Laws*, 42 FCC2d 399 (1951). Here, Coastal states that French's application was found by the Texas Court to breach a non-competition clause in the employment agreement, and that the Court has, accordingly, ordered him to withdraw his application. Coastal argues, therefore, that, under the *Hanover Radio* doctrine, the Commission is bound to give comity to the Court's decision. Coastal further maintains that it is a long established principal that the Commission "is not the proper forum for the resolution of private contractual disputes and that such matters are appropriately left to the courts or other forums which have jurisdiction to resolve them." *Sonderling Broadcasting Co.*, 46 RR2d 889, 894 (1979), *citing Transcontinent Television Corp.*, 21 RR 945 (1961).

7. Coastal also maintains that French misreads Section 311(d)(3) of the Communications Act, when he states that the Commission was required to make a finding that the dismissal of his application was in the public interest. Rather, Coastal argues that the section pertains only to settlement agreements and is inapplicable here. Additionally, Coastal states that French is in error when he insists that the Commission should have withheld action on the applications until French has exhausted his state appeal rights. In that connection, Coastal contends that it is Commission policy not to await "finality" of collateral litigation before acting on pending applications. *Sonderling Broadcasting Co., supra* at p. 894-95. Coastal adds that delay by the Commission would provide French with the very relief that the Texas Court of Appeals itself has already denied him when it refused to stay effectiveness of the trial court's injunction. The licensee further maintains that delay would have the effect of undoing the agreement between Coastal and the Bank, to the station's financial detriment. Finally, Coastal argues that French has failed to raise questions about its qualifications to have its license renewed and that, in any case, the proper procedure is to raise appropriate allegations in a petition to deny -- not in a petition for reconsideration.

8. In response, French challenges Coastal's assertion that the filing of his petition for reconsideration is violative of the District Court Order. Rather, he maintains that he has a constitutional right "to seek redress or petition the government." In any event, he asserts that the Court's decree expired on November 14, 1988. French further argues that it was Coastal -- not French -- who failed to comply with the terms of the employment contract and that the District Court recognized that fact. Additionally, French contends that Coastal has failed to file a copy of its agreement with the Bank to sell the station, as required by Section 73.3613 of the Rules, although the agreement's existence has been known since June 1988. It is this failure that French gives as a basis for questioning the licensee's qualifications to remain a Commission licensee. Finally, with respect to the licensee's argument that the Commission should allow the States to determine contractual rights, French asserts that the contractual matters must first be found not to conflict with federal policy.

9. On February 2, 1989, the Texas Court of Appeals affirmed the District Court's injunction requiring French to withdraw his application. The Appeals Court, however, modified the injunction insofar as it had restrained French from speech concerning Coastal's renewal application. On February 16, 1989, French filed a Motion for Rehearing before the Court of Appeals. That request was denied on February 28, 1989. Subsequently, on March 29, 1989, French informed the Commission that he had appealed the lower courts' decisions to the Supreme Court of Texas.

DISCUSSION

10. Once French's competing application was on file, there were two ways by which he could achieve a voluntary dismissal of it: (1) by agreement with Coastal and with approval of the Commission, pursuant to Section 311(d) of the Communications Act and Section 73.3525 of the Rules; or (2) by requesting its dismissal, as provided by Section 73.3568 of the Rules. Since French and Coastal did not enter an agreement for the dismissal of his application, the provisions of Sections 311(d) of the Act and 73.3525 of the Rules are inapplicable to the situation before us, and Coastal cannot be found to have violated their provisions. Therefore, on this point there is no question as to Coastal's qualifications to remain a licensee. Further, we were not required to make a specific finding that the dismissal would serve the public interest, as French argues. On September 16, 1988, French requested that his application be dismissed and that Coastal's renewal application be granted. While his attached affidavit did indicate that his request was based on a court decision and that, if he were successful on appeal, he reserved the right to seek reinstatement of his application, that did not change the unqualified nature of his request. Rather, it merely preserved his right to seek reinstatement in the future. Indeed, a conditional request for dismissal

would not have complied with the District Court's Order. Subsequently, on December 27, 1988, his application was dismissed and Coastal's renewal application was granted.

11. The question now before us is whether French's dismissal request was filed in response to a legitimate order of a court of competent jurisdiction and whether we should accede to that order. We believe that the answer to both questions is "yes" and that our December 27 actions should stand. While the ability to file an application before the Commission is a privilege offered by the Communications Act, an individual could give up that privilege in the context of a contract, and, in fact, covenants not to compete are standard clauses in many broadcast employment contracts. The Texas District Court found that French had entered into such an agreement and had, therefore, waived his privilege to file a competing application against Coastal until at least November 14, 1988.[4] In that connection, it is irrelevant that French was not competing with Coastal during its present license term; the Court found that French's application violated the non-competition clause of his management contract, and we will not question that conclusion. Although French asserts that this case should not be considered to involve contract enforcement, it clearly pertains to a state court action with respect to French's employment contract. We reject, therefore, his attempt to depart from our precedent on that subject. It is well settled that Congress has not pre-empted the field of contracts relating to broadcasting and that there is no conflict between state and federal policy as to a covenant not to compete. *Raul Santiago Roman*, *supra* at p. 181. Where, as here, the terms of the covenant are reasonable and the parties entered the agreement in full knowledge of its contents, it is Commission policy to defer to a state court's determination of private contractual rights, unless compelling and overriding public interest considerations are shown to exist. *Hanover Radio, Inc.*, *supra* at p. 405; *Raul Santiago Roman*, *supra* at p. 181-82. While French is correct in asserting that *Hanover Radio Inc.*, *supra*, has a different factual situation than that which is presented here, we do not view that as altering the basic proposition that the Commission will recognize state court decisions applying local contract law in connection with the pendency of applications before the Commission. Although we recognize that the matter is still not final in the state courts, we nevertheless believe it was appropriate for the Commission to take action, since no stay of the Texas District Court's Order has been issued, despite two unsuccessful appeals by French to the Texas Court of Appeals. Since that Order, as subsequently modified, is still in effect, we affirm our December 27, 1988, action dismissing French's application. While it is true that such action would deny the Commission an opportunity to choose between two applicants, such choices must always be among applications properly before the Commission, and that is not the case here.

12. As a final matter, we turn to the other aspect of French's reconsideration petition, his challenge to the grant of Coastal's renewal application. It appears that the only issue raised is Coastal's alleged failure to file a copy of its agreement with the Bank to sell the station. Section 73.3613 of the Rules requires licensees to file agreements for the assignment of license with the Commission within 30 days of execution. The agreement was executed on January 10, 1989, and was filed with the Commission on February 9, 1989, or within the period allowed by the Rules. Consequently, French's sole argument against grant of the renewal application is without basis. We therefore affirm the grant of that application, as well.

13. Accordingly, for the reasons stated above, French's petition for reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

FOOTNOTES

[1] On December 30, 1988, French sent the Commission a telegram in which he sought reconsideration of the December 27 actions. Since the telegram was unsigned, however, it could not be considered as a petition for reconsideration, pursuant to Section 1.52 of the Commission's Rules. A formal petition for reconsideration was subsequently filed on January 5, 1989.

[2] In this connection, it should be noted that, on March 17, 1989, Coastal and the Bank filed an application for assignment of the station's license.

[3] *Hanover Radio, Inc.*, *supra*, involved a state court's issuance of an order compelling specific performance of a settlement agreement from which one of the applicants withdrew. The Commission determined that the court had the power to make such a determination and that the question of whether a contract is valid and binding is a matter of state contract law, regardless of the nature of the contract or the pendency of Commission proceedings in that connection.

[4] The Court has not yet determined whether the termination was for cause or without cause, but the least time French would be prohibited from competing with Coastal would be six months from the date of termination, or until November 14, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 14, 1989

THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY FILES REVISIONS TO ITS COST ALLOCATION MANUAL

On March 28, 1989, the Southern New England Telephone Company (SNET) filed proposed revisions to its permanent cost allocation manual for the separation of regulated and nonregulated costs. SNET filed its original manual in 1987 pursuant to the requirements of the Commission's *Joint Cost Order*, 2 FCC Rcd 1298 (1987).

Parties may file comments on the proposed revisions to the cost manual no later than **May 12, 1989.** Replies should be filed by **May 30, 1989.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are also available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 14, 1989

GENERAL TELEPHONE OPERATING COMPANIES FILE REVISIONS TO THEIR COST ALLOCATION MANUAL

On March 22, 1989, the General Telephone Operating Companies (GTOC) filed proposed revisions to their permanent cost allocation manual for the separation of regulated and nonregulated costs. GTE filed its original manual in 1987 pursuant to the requirements of the Commission's *Joint Cost Order*, 2 FCC Rcd 1298 (1987).

Parties may file comments on the proposed revisions to the cost manual no later than **May 12, 1989.** Replies should be filed by **May 30, 1989.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are also available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 14, 1989

AMERITECH, BELL ATLANTIC, PACIFIC BELL, NEVADA BELL BELLSOUTH AND SOUTHWESTERN BELL FILE REVISIONS TO COST MANUALS

PUBLIC COMMENT INVITED

On March 31, 1989, the six companies listed above filed proposed revisions to their permanent cost allocation manuals for the separation of regulated and nonregulated costs. The companies filed their original manuals in 1987 pursuant to the requirements of the Commission's *Joint Cost Order*, 2 FCC Rcd 1298 (1987).

Parties may file comments on the proposed revisions to the cost manuals no later than **May 12, 1989.** Replies should be filed by **May 30, 1989.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are also available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Comm unications Commission
Washington, D.C. 20554

In re Applications of

TED TUCKER AND JANA TUCKER
San Manuel, Arizona

File Nos. BMPFT-880329TA
BLFT-880512TD

For Modification of Construction Permit and License for FM Broadcast Translator Station K285DL

MEMORANDUM OPINION AND ORDER

Adopted: March 16, 1989; Released: April 17, 1989

By the Commission: Commissioner Quello dissenting in part, and issuing a statement.

1. The Commission has before it for consideration: (a) the above-captioned applications for modification of construction permit[1] (FCC Form 346) and for license for an FM broadcast translator station (FCC Form 347) filed by Ted Tucker and Jana Tucker (Tuckers);[2] (b) a petition for reconsideration filed May 25, 1988, by the Tucson Broadcasters Association (TBA); [3] (c) an opposition filed June 8, 1988, by the Tuckers; (d) a reply filed June 20, 1988, by TBA; (e) a pleading entitled "Petition for Reconsideration/Petition to Deny" filed July 25, 1988, by Joel Wayne Russell and Frances R. Russell (Russells); and (f) a motion to strike filed August 2, 1988, by the Tuckers.

2. The initial application for FM translator station K285DL was filed November 3, 1986, by Coronado Broadcasting Corporation, licensee of station KAWV(FM) (formerly KHYT(FM)), Oracle, Arizona. The applicant proposed to serve San Manuel, Arizona, with the translator rebroadcasting the signal of station KAWV(FM).[4] San Manuel is located within the 1 mV/m contour of station KAWV(FM), the primary station. However, due to intervening terrain features, reception of its signal there is inadequate. The unopposed application was granted on January 30, 1987. On March 29, 1988, the applicant filed an application to change from a directional to a non-directional antenna and reduce effective radiated power. The cover letter to the application advised that it was a minor change application and was therefore not subject to the freeze on acceptance of new or major change applications for commercial FM translator stations. It also noted that as a minor change application no fee was required. The application was not contested, and on April 25, 1988, was granted. The petitions for reconsideration of the April 25, 1988 grant followed.

The TBA Petition

3. 47 C.F.R. Section 1.106(b)(1) provides that a party seeking reconsideration who did not participate in the earlier stages of the proceeding must demonstrate how they are adversely affected by the action under reconsideration and show good reason why they were unable to participate in the earlier stages of the proceeding. TBA comprises several full service FM radio stations serving Tuscon, Arizona. Because the Tucker's translator, as modified, would directly compete with TBA member stations, TBA asserts that it will be adversely affected by the operation of that translator station. TBA further asserts that inasmuch as the Tucker's application to modify K285DL was granted four days after the release of a Public Notice announcing acceptance of the application, TBA did not have an opportunity to participate in the earlier stages of this proceeding. We believe that TBA has made the showing required per Section 1.106(b)(1) and therefore conclude that TBA has standing to file the instant petition for reconsideration.

4. TBA alleges that the March 29 amendment proposed substantial changes to the facilities authorized by the initial construction permit. TBA claims that under the rules this constitutes a major change and not a minor change as alleged by the applicant. According to TBA, the translator, as modified, would serve approximately 20 times the population as that located within the 1 mV/m contour of the primary station. This means that the translator station would serve 284,258 persons while the primary station's service area population is only 14,963. In addition, TBA asserts that the amendment increased the translator's 1 mV/m coverage area fourfold, from approximately 236 square miles to 992 square miles. Thus, the translator, which was granted authority to serve San Manuel, would now cover approximately 90% of Tucson. In TBA's view, the application to change the antenna system was clearly a major change application under the rules. As such, they contend it was unacceptable for filing because it was filed after the freeze was imposed on the acceptance of FM translator applications for new or major changes in facilities.[5] In addition, TBA alleges that the modified proposal is "technically flawed" in several respects. More specifically TBA alleges the following deficiencies:

> i) The modified proposal is mutually exclusive with an application filed by the Russells for a proposed new co-channel translator station to serve Tucson, Arizona.
>
> ii) The modified proposal will cause interference to a proposed new co-channel FM broadcast station at Kearny, Arizona.
>
> iii) The modified application violates Section 74.1235 in that it proposes the use of separate 10 watt outputs to feed a 4 bay antenna of which the horizontal and vertical elements may not be fed separately because each element of the antenna is used for both polarization components.

5. The Tuckers, in opposition, deny the allegations and assert that whether an application is a major change or not does not depend on the total size of the translator's proposed coverage area, the percentage change in the coverage area, the size of the proposed coverage area relative to the primary station's coverage area or the additional communities and areas which will fall within the proposed coverage area. According to the Tuckers a major change results only when a change is proposed in a translator's output channel or the community or area the translator is licensed to serve. In the Tuckers' view, their application did not involve any of these factors. The

Tuckers concede that station K285DL, as modified, will cause interference to the Russells' proposed new translator station. However, they counter that the Russells' proposal would cause interference to station K285DL's facilities as they existed prior to the March 29 amendment. In the Tuckers' view, this makes the Russells' application unacceptable for filing. Concerning the allegations of interference to a full service FM station, the Tuckers assert that TBA has not demonstrated that its modified facilities will cause interference as defined in the rules. In the event any interference is caused by the translator, the Tuckers represent that they will take such corrective action to eliminate the interference as the rules require. The Tuckers concede that their modified antenna proposal does not strictly conform to the rules. They assert, however, that the type of antenna system proposed is "well known to both the Commission and every competent consulting engineer" and complies with the limitations of the rules. The Tuckers assert that the application conforms to all Commission Rules. TBA, in reply, continues to object to the proposal.

6. 47 C.F.R. Section 73.3573(a)(1) concerns, in relevant part, the processing of FM translator station applications. It provides that any application proposing a change in output frequency, or authorized principal community or area is a major change application. Here, the Tucker's March 29, 1988, application to modify the facilities of station K285DL ostensibly proposed only to modify the antenna system. It did not explicitly propose a change in output frequency, principal community or area. It stands unrefuted on the record, however, that the proposed antenna modification would increase the station's coverage area fourfold and would increase the population served 20 times. In addition, the translator station's 1 mV/m contour would now cover 90% of Tucson, a community that it did not serve initially. The facilities proposed in the March 29 application substantially surpass the facilities authorized initially. The application proposed is clearly a major change and not a minor change as asserted by the applicant.

7. Ordinarily, in these circumstances, we would require the applicant to pay the filing fee for a major change application and place it on the next cut-off-list. Here, however, the application was filed on March 29, 1988, five days after our implementation of a freeze on the acceptance of applications for new commercial FM translator stations or for major changes in the facilities of existing commercial FM translator facilities.[6] The application is, therefore subject to the freeze. This means that it is unacceptable for filing and will be returned.

8. We recognize that the imposition of the freeze on the acceptance of FM translator major change applications has created a need for greater clarity in the standards used to define major and minor changes. FM translators generally have limited service areas and are not required to place any particular signal strength contour over the community or area to be served. Indeed, not all translators are licensed to serve defined communities.[7] Furthermore, very modest changes to the transmitting facilities of a translator, such as the replacement of an antenna or a slight shift in antenna location, will incidentally result in some change in the area served by the translator.[8] A rigid insistence that there be absolutely no change in area would require that most if not all changes in the facilities of translators be treated as major changes. That result would be incongruent with our characterization of modifications in the primary FM broadcast service and would serve no useful purpose. Clearly the language of Section 73.3573(a)(1) needs to be applied in a manner which will separate the inconsequential and unavoidable changes in area from the more substantial changes which warrant thorough scrutiny by the public and the Commission.

9. Therefore, for the purpose of administering proposals to modify the facilities of FM translators we will generally consider a proposal to be a minor change if at least 90% of the area within the proposed 1 mV/m contour is encompassed by the previously authorized 1 mV/m contour. This assumes, of course, that there is no change in output frequency or principal community. We believe that this approach will benefit all parties by enabling us to expeditiously dispose of applications involving insignificant and unavoidable changes in area and which are unlikely to affect the interests of other parties. Greater changes in area are, we believe, the result of deliberate design choices and should be treated as major changes.

10. Although dismissal of the Tuckers' March 29 application moots TBA's allegations concerning the proposal's technical deficiencies, TBA's petition raises a broader policy question. This question focuses on the types of antenna systems that can be used by FM translator stations, given advances in technology to achieve the power limitations set forth in Section 74.1235 of the rules.[9] Recent proposals contemplate use of systems that make more efficient use of available equipment, which are consistent with the spirit and the purpose of the existing rules, but which are arguably beyond the scope of the rules. We will therefore take this opportunity to clarify the scope of Section 74.1235 with regard to the the types of antenna systems that can be utilized for FM translator proposals to achieve the power limitations set forth in that section of the rules.

11. We will deal with two specific systems that are currently being proposed by applicants. The first of these is exemplified by the Tuckers' modification application. The Tuckers proposed to feed their circularly polarized antenna with a single transmission line powered by two separate 10 watt amplifiers. The second situation also involves the use of a single transmission line. The single line here receives its power output from a single amplifier and carries it to a power divider. The power divider then directs power to each of several antennas, all serving a different community, with each antenna receiving no more power than it would receive if a single amplifier with a single transmission line were being used. The problem is that Section 74.1235 does not contemplate combining power into a single transmission line. Nor does it appear to contemplate the use of a final radio frequency amplifier capable of producing more than the power output authorized by the rules.

12. The rule in fact is quite specific. Depending on the geographic location of an FM translator station's service area, a maximum of one or ten watts transmitter power output (TPO) of the final radio frequency (RF) amplifier may be fed to a single transmitting antenna. The TPO may also be divided between two or more transmitting antennas or arrays of antennas as long as a single feed is used to each antenna. The rule also provides that more than one radio frequency amplifier may be authorized in individual cases if each amplifier provides service to a different community. If more than one amplifier is used to provide service to the same community or area, the radiated fields from the separate antennas cannot combine

in any direction to attain an effective radiated power (ERP) in excess of that which would be produced by a single antenna fed by an amplifier operating at the authorized output power. Two amplifiers may also be used to serve the same community if one is used to feed an antenna producing a horizontally polarized signal and one is used to feed an antenna producing a vertically polarized signal. Thus, the rule requires each antenna or antenna array to be fed by a single RF amplifier with a power output no greater than the maximum authorized using a single transmission line.

13. The Tuckers proposed to use a single circularly polarized antenna, which would produce signals in both vertical and horizontal planes and to feed this one antenna with a single transmission line. Reading the rule literally, TBA contends that the Tuckers could not use an antenna that has integrated horizontal and vertical elements since it would not be possible to feed each plane separately. TBA further contends that the 20 watts TPO to be used to feed the single antenna was in excess of the 10 watts allowed by the rules, and therefore was prohibited.

14. Under the circumstances described by TBA it has been our practice to permit a single feed with double the transmitting output power otherwise allowed. This is so because the effect is no different than if separate feeds were used to serve separate antennas, one producing a horizontally polarized signal and the other producing a vertically polarized signal. In the case of a dual plane polarized antenna, the antenna gain factor, or multiplier, for each plane is one half that of a single plane polarized antenna. Hence, if only a 10 watt TPO feed were used, the equivalent antenna output power and attendant coverage would be half that of an equal size single plane polarized antenna. Thus, a feed with twice the authorized TPO is allowed to feed a circularly polarized antenna comprised of integrated vertical and horizontal elements on the single antenna since the net result is equivalent antenna output power. This approach accommodates the use of more technically advanced equipment and is a more economical and efficient means of providing coverage to an authorized service area, but does not undermine the intent of the rule.

15. Section 74.1235 also provides that if multiple antennas or antenna arrays are used to serve separate communities, each must have a single amplifier of no more than 1 or 10 watts and each must use a separate transmission line to feed each transmitting antenna. Theoretically, this means that a proposal to serve two different communities using two different directional antennas would require two amplifiers and two separate feeds. However, we see no inconsistency with the rules to allow a single amplifier in excess of 1 or 10 watts and a single transmission line to feed multiple antennas. Numerous applicants have shown that this can be accomplished by locating a power divider on the tower. The power divider takes the incoming power and divides it proportionately to supply each antenna with no more than its authorized power (one or ten watts, as appropriate). Although the output power of the final frequency amplifier is in excess of that permitted by the rules, these proposals are technically more efficient and comply substantially with the rule since no more than the authorized power is utilized by any one antenna. Accordingly, we will process and grant applications containing these proposals as being in conformance with the rules and therefore not requiring a waiver.

16. We wish to stress that these interpretations of the rules reflect current practice and are not a predetermination of new standards that might be adopted in light of our comprehensive Notice of Inquiry (NOI) on the role of the FM translator service.[10] Until we evaluate the comments filed in that NOI and adopt new rules, if any, we will continue to process applications consistent with current practices. It is the responsibility of the applicants to demonstrate that their proposals conform with the power limitation of the rule. It must also be shown that any non-conforming technical proposal will not cause interference to any regularly used off-the-air signal of any authorized broadcast station and otherwise conforms to all the rules concerning FM translator stations.

The Russell Petition

17. The Russell's contend that the Tucker's modification of K285DL will interfere with the new translator station proposed by the Russell's in application File No. BPFT-880301TB which was filed almost one month prior to the filing of the Tucker's modification application. The Russell's thus request reconsideration of the grant of the construction permit to modify K285DL and denial of the application for license to cover the construction permit. We note that as a petition for reconsideration, the Russell pleading is untimely since it was filed almost two months after the deadline for filing petitions for reconsideration in this proceeding. The Russells have offered no explanation as to why this pleading is untimely or, for that matter, why they were unable to participate in the earlier stages of this proceeding pursuant to 47 C.F.R. Sections 1.106(b) and (f). Accordingly, the petition for reconsideration is procedurally defective and will be dismissed. Furthermore, 47 U.S.C. Section 319(c) excludes applications for license to cover construction permits from those applications against which a petition to deny may be filed. Accordingly, as a petition to deny, the Russell pleading is also procedurally defective and will be dismissed. Furthermore, the application for license to cover construction permit BMPFT-880329TA was amended on June 13, 1988, to specify construction permit BMPFT-861103TD as the authorization for which a license to cover is being sought. Because the Russell's have no objection to grant of a license to cover BPFT-861103TD, their pleading, when treated as an informal objection to grant of the license application, is moot.

18. Accordingly, for the reasons stated herein, the petition for reconsideration filed by the Tuscon Broadcasters Association IS GRANTED to the extent set forth above and in all other respects IS DISMISSED as moot; the petition for reconsideration/petition to deny filed by Joel Wayne Russell and Frances R. Russell IS DISMISSED; the grant of construction permit BMPFT-880329TA IS RESCINDED and application File No. BMPFT-880329TA IS RETURNED as unacceptable for filing pursuant to the freeze on acceptance for filing of applications for new or major changes to the facilities of commercial FM translator stations; and the license application (BLFT-880512TD), as amended, to cover construction permit BPFT-861103TD IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The modification application was filed by Coronado Broadcasting Corporation. Subsequently the Corporation was dissolved and the permit for station K285DL, pursuant to Commission consent, was assigned to the stockholders, Ted Tucker (50%) and Jana Tucker (50%) (BAPFT-880421TB granted May 6, 1988).

[2] The license application was originally filed to cover the construction permit as modified by BMPFT-880329TA. It was subsequently amended to cover the original construction permit BPFT-861103TD.

[3] The Tucson stations joining in the filing of this petition are KJYK(FM), KWFM(FM), KRQQ(FM) and KLPX(FM).

[4] FM translator stations are low power secondary service broadcast stations. They retransmit the signals of an FM radio broadcast station or another FM broadcast translator station without significantly altering any characteristics of the incoming signal other than its frequency and amplitude. They are intended to provide FM broadcast service to areas and populations which are unable to receive satisfactory service by reason of distance or intervening terrain obstructions. *See Report and Order, Amendment of Part 74 of the Commission's Rules and Regulations to Permit the Operation of Low Power FM Broadcasting Translator and Booster Stations*, 20 Rad. Reg. 2d (P&F) 1538 (1970). FM translators are authorized without regard to the FM table of allotments. They are permitted to operate only where they cause no interference to the direct reception by the public of the off-the-air signal of any authorized broadcast station, including Class D noncommercial educational FM stations. *See generally* 47 CFR 74.1200, *et seq.* (1988).

[5] *See Public Notice, Freeze Imposed on Filing of Applications for New FM Translator Stations*, Mimeo 2249, released March 24, 1988.

[6] *See* n.5, *supra*.

[7] *See*, for example, station K224BM, Rural Utah County, Utah.

[8] The 1 mV/m contour is commonly used in the estimation of coverage and is used, when appropriate, for processing FM translator applications.

[9] Section 74.1235, in part, states:

> (a) The power output of the final radio frequency amplifier of an FM translator shall not exceed 10 watts, except that FM broadcast translator stations serving areas east of the Mississippi River or in Zone I-A shall be limited to 1 watt. This power may be fed into a single transmitting antenna or may be divided between two or more transmitting antennas or arrays of antennas in any manner found useful or desirable by the licensee. In individual cases, the Commission may authorize the use of more than one final radio frequency amplifier at a single station under the following conditions:
>
> (1) Each such amplifier shall be used to serve a different community or area. More than one final radio frequency amplifier shall not be authorized to provide service to all or part of the same community or area, except as provided in paragraph (a)(2) of this section.
>
> (2) The transmitting antennas or antennas arrays shall be so designed and installed that the radiated fields from the separate antennas shall not combine in any direction in any single plane of polarization to achieve the effect of radiated power in excess of that which would be produced by a single antenna or antenna array fed by a radio frequency amplifier with power output no greater than that authorized pursuant to paragraph (a) of this section. Two radio frequency amplifiers may be used to serve the same community if one is used to feed an antenna designed to produce a horizontally polarized signal, and the other a vertically polarized signal.

[10] *Notice of Inquiry, Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, 3 FCC Rcd. 3664 (1988).

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO DISSENTING IN PART

In re: Applications of Ted Tucker and Jana Tucker, San Manuel, Arizona

I support the majority's decision that the application constitutes a major change. As the majority correctly note, the proposed modification would increase the station's coverage area fourfold and would increase the population served 20 times. The proposed facilities would substantially exceed those authorized. Because the aplication was filed after we imposed our freeze on acceptance of new commercial translators, it is an unacceptable major change subject to the freeze.

I must disagree, however, with the decision to consider a 10% change in a translator's service area as a minor change, *per se*. Instead, the Commission should examine each proposal to determine whether the change is insubstantial or unavoidable. Such an analysis would be particularly appropriate where a 10% increase in coverage is directed towards areas already served by full service facilities. Given the disposition of the application in this case, there is no need to address the broader policy issues concerning single or multiple transmission lines that serve multiple antennas. Technical questions relating to Section 74. 1235 of the rules are better left to our comprehensive examination of translator policies. *Notice of Inquiry* in MM Docket No. 88-140, Amendment of Part 74 of the Commission's Rules concerning FM Translator Stations, 3 FCC Rcd 3664 (1988). Accordingly, I dissent in part to the Commission's decision.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-440

In re Applications of

EVANGEL COMMUNICATIONS, INC.	File No. BPCT-860410KN
ACHERNAR BROADCASTING COMPANY	File No. BPCT-860410KP
LINDSAY TELEVISION, INC.	File No. BPCT-860410KQ

For Construction Permit
for a New Television Station
Charlottesville, Virginia

MEMORANDUM OPINION AND ORDER

Adopted: March 31, 1989; Released: April 17, 1989

By the Review Board: MARINO (Chairman) and BLUMENTHAL. Board Member ESBENSEN absent.

1. The Review Board is now in receipt of supplemental comments filed by the parties to this proceeding pursuant to our earlier *Order*, 4 FCC Rcd 829 (1989). Upon review of these pleadings, we conclude that remand of this proceeding for further hearing is necessary.

2. Our *Order* was in response to exceptions filed by Achernar Broadcasting Company (Achernar) to its disqualification by the *Initial Decision* (*I. D.*), 3 FCC Rcd 5421 (1988) under the following issue [1]:

> To determine whether there is a reasonable possibility that operation by Achernar as proposed would result in objectionable interference to the conduct of radio astronomy activities by the National Radio Astronomy Observatory ["NRAO"] in the West Virginia "Quiet Zone."

Achernar claimed that the ALJ erred in not considering "the fact that any grant on Channel 64 precludes its radio astronomy use under NRAO's interference criteria"; that "any use of Channel 64 in Charlottesville from any site would preclude its radio astronomy use"; and that although Lindsay Television, Inc. (Lindsay), the winner below, would transmit from outside the "Quiet Zone," whereas Achernar would transmit from inside the zone, "the same interference would result from any grant" and that both proposals would render Channel 64 "unusable" to NRAO for purposes of astronomical observations. (Achernar Br. at 7, 10, 22.) Achernar's hearing Exhibit 6, "Worknotes Regarding Power Densities of All Three Applicants," which Achernar proffered to support its contentions, was rejected by the ALJ and allowed in the record only as an offer of proof, although the engineering consultant who prepared it was permitted to be cross-examined on its contents. With this background in mind, the Board directed the parties to provide their views "with respect to the accuracy of Achernar Exhibit 6 and to Achernar's deductive representations that purportedly derive therefrom." *Order*, 4 FCC Rcd at 829. We now turn to a review of the comments submitted. [2]

3. Achernar submits that its engineer, John J. Mullaney, reviewed its Exhibit 6 and found no calculation errors. It also states that Mullaney, Philip L. Rice, another witness who also gave engineering testimony, [3] and Richard Fisher, the engineer who testified for NRAO, "are unanimous in their conclusion that operation as proposed by any of the applicants would render that portion of the spectrum occupied by Channel 64 (770-776 mHz) unusable to the Observatory." (Achernar Br. at 2.) In view of this "deductive representation," Achernar concludes that it would serve no rational purpose to disqualify Achernar and permit a grant to Lindsay. In support, Achernar attaches to its pleading a further engineering statement prepared by Mullaney.

4. NRAO asserts that Achernar's Exhibit 6 is inaccurate and unreliable. Supported by the attached declaration of its engineer, Richard Fisher, NRAO claims that the exhibit's calculations fail to take into account the proper terrain and the proper path; that is, they fail to consider a sixth terrain obstacle located between Achernar's proposed transmitter site and Green Bank, and they miscalculate the azimuth between Achernar's transmitter site and Green Bank. NRAO also objects to Achernar's reliance on hearing testimony of Mullaney and Rice (para. 3, *supra*), because that testimony was given under the misrepresentation issue against Achernar, [4] and not the Quiet Zone issue, and NRAO was only made a party herein with respect to the latter issue. Thus, it is NRAO's position that there is no evidence in the record under the pertinent issue that Lindsay will cause objectionable interference to NRAO's operations in Green Bank. On the other hand, NRAO states, it is uncontradicted, and even conceded by Achernar, that Achernar will cause objectionable interference to the Green Bank operations. For this reason, NRAO concludes, with or without Achernar's Exhibit 6, the Board should deny Achernar's application.

5. The Mass Media Bureau does not dispute the calculations contained in Achernar's Exhibit 6. According to the Bureau, those calculations indicate that, when computed without regard to terrain, Lindsay's signal is 37.6% greater than Achernar's at the Quiet Zone, whereas when the calculations take into account terrain shielding, Achernar will cause approximately three times as much interference as Lindsay at the NRAO facility. Thus, the Bureau disagrees with Achernar's contention that Lindsay will cause "the same interference" to the NRAO facility as will Achernar. Furthermore, the Bureau opines that NRAO would have no basis to object to interference caused by Lindsay because Lindsay's site is located outside of the Quiet Zone, and that Achernar may not use the interference caused by Lindsay as a justification for its own proposal which causes objectionable interference from a site located within the Quiet Zone. Because it believes that Achernar's "deductive reasoning" would ren-

der Section 73.1030(a) of the Rules meaningless, the Bureau supports the ALJ's resolution of the Quiet Zone issue.

6. For its part, Lindsay objects to any further evidentiary proceedings or engineering submissions to determine the impact of Lindsay's proposal on the Quiet Zone. It argues that such a step would be outside the Board's authority; and that if the Board wishes to modify the Commission's policies protecting the Quiet Zone, it should certify the matter to the Commission rather than requiring further engineering presentations. A remand, Lindsay argues, would in effect unfairly reward an applicant, Achernar, which has violated the Quiet Zone, at the expense of a competing applicant, Lindsay, which has at all times protected the Quiet Zone in accordance with Commission requirements. In further support of its position, Lindsay attaches a portion of its Reply brief wherein it disputes Achernar's claim in its Exceptions that it would cause only "slightly less" interference to NRAO than would Lindsay. Specifically, Lindsay argues that its transmitter site is in a valley at a lower elevation than Achernar's, and that the signal loss due to intervening terrain between the respective sites and the Observatory is nine times greater for Lindsay than for Achernar. Taking operating power, height, transmitter location, and signal attenuation into account, Lindsay maintains, Achernar would create three times as much interference to the Observatory as would Lindsay.

7. In reply to the comments of the other parties, Achernar states that neither Lindsay nor the Mass Media Bureau disputes the accuracy of Achernar Exhibit 6 and that NRAO, which did not make an independent calculation of the interference it would receive from Lindsay's proposal, is mistaken in claiming that Exhibit 6 contained two major errors. In support of its latter contention, Achernar attaches another engineering statement from Mr. Mullaney. Achernar counters Lindsay's suggestion that any lesser interference is preferable to greater interference on the ground that operation by either applicant would render Channel 64 unusable by NRAO. Achernar also accuses Lindsay and the Bureau of addressing matters outside the scope of the Board's *Order* calling for supplemental briefs, which matters were already the subject of argument in the parties' exceptions and reply briefs, and concludes that the calculations in its Exhibit 6 were accurate as were its deductive representations derived therefrom.

8. Upon review of the pleadings summarized above, it appears to us that, notwithstanding our expectations to the contrary, the parties have generated more heat than light. The underlying question raised by our *Order*, *i. e.*, whether the record supported Achernar's claim that a grant to either Achernar or Lindsay would *preclude* NRAO from using Channel 64 for purposes of radio astronomy, remains unanswered. We directed the parties to address the accuracy of Achernar's hearing Exhibit 6 and the representations flowing from it; Achernar (not surprisingly) and the Bureau support the Exhibit's calculations, whereas NRAO challenges them; and, for its part, Lindsay is silent as to the Exhibit's accuracy. It is not possible at this stage to resolve the conflict between Achernar and NRAO on the basis of these pleadings, because both have supported their technical arguments with statements of qualified engineers. This problem is complicated by NRAO's further objection that engineering testimony relied on by Achernar did not enter the record under the Quiet Zone issue; and, consequently, NRAO had no opportunity to challenge it at the hearing. Furthermore, although Lindsay and the Bureau both claim that Achernar will create three times the level of interference of Lindsay, neither tells us whether, despite this alleged quantitative difference, Achernar is correct that both proposals would render Channel 64 *equally unusable* to NRAO. In short, further hearing is necessary in order to resolve the engineering conflicts before us through cross-examination of expert witnesses, to give NRAO the opportunity to participate fully in developing a complete record, and because we believe it essential to establish what exactly will be the impact on radio astronomy activities in the Quiet Zone of a grant of either applicant before us. *See generally Meredith Corp.*, 2 FCC Rcd 3927 (Rev. Bd. 1987) (remand required to resolve conflicting economic studies and to allow cross-examination of expert witnesses).

9. In reaching this conclusion, we are well aware that Section 73.1030(a) of the Commission's Rules (note 1, *supra)* literally requires only an applicant proposing to operate within the Quiet Zone boundaries to notify NRAO, which is in turn permitted to object to or comment upon the application proposal. Indeed, it is this literal reading which causes both the Bureau and Lindsay to protest Achernar's efforts to equate the interference to the NRAO facility caused by the Lindsay and Achernar proposals. And we take the point made by the Bureau and Lindsay that Achernar may not use the interference caused by Lindsay's proposal as a defense against its own violation of the Quiet Zone, any more than a motorist caught speeding on the highway could successfully mitigate his own infraction by pointing at others who are also speeding. Our concern here, however, is to avoid an anomalous public interest result which could obtain if, in fact, the detrimental impact on the Quiet Zone, which it is the Commission's policy to minimize, would be effectively the same no matter which application is granted in this proceeding; *viz.*, the practical elimination of Channel 64 as a usable radio astronomy frequency. It has been the Commission's policy for thirty years that it is "in the public interest to provide maximum practicable protection from interference to radio astronomy measurements at Green Bank . . . without unduly disrupting existing radio services." *Report and Order, Protection of Radio Astronomy Frequencies*, 17 RR 1738, 1739 (1958). In that connection, and as indicated in note 5, *infra*, Section 73.1030(a) (Quiet Zone Rule) is not a "go/no go" mechanism, but requires that we consider the comments or objections of NRAO as to requests to locate broadcast facilities within that zone. In considering the position of NRAO in the instant case, we believe it is plainly relevant whether its objections are persuasively based on the substance of interference to Channel 64 rather than the form of the rule. [5] Accordingly, we reject the overly restrictive view of how to proceed in this case put forth by Lindsay and the Bureau, in order that we may avoid achieving a result which would serve neither NRAO's actual substantive interests nor the broader public interest. In sum, we remand this proceeding for the reasons set forth herein.

10. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED for further hearing consistent with this opinion and for the preparation of such Supplemental Initial Decision as may be warranted by a supplemental record; and

11. IT IS FURTHER ORDERED, That the issues are enlarged by the addition of the following issue:

To determine whether the electrical interference to be caused by Achernar, or Lindsay, or both, would render Channel 64 equally unusable to NRAO for its radio astronomy purposes.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] This issue was designated because Section 73.1030(a) of the Commission's Rules, 47 CFR §73.1030(a), requires an applicant proposing to operate a broadcast station at a site within an area bounded by certain coordinates to notify the National Radio Astronomy Observatory (NRAO) in Green Bank, West Virginia to determine if harmful interference would occur from the proposed station to the NRAO facilities.

[2] These pleadings are: (a) Memorandum Re: Achernar Exhibit 6, filed by Achernar on February 6, 1989; (b) Responsive Comments, filed by National Radio Astronomy Observatory (NRAO) on February 16, 1989; (c) Comments, filed February 17, 1989 by the Mass Media Bureau; (d) Supplement filed by NRAO on February 22, 1989; (e) Responsive Comments filed by Lindsay on February 22, 1989; and (f) Reply filed by Achernar on March 6, 1989.

[3] Achernar identifies Rice as "one of the principal authors of Tech Note 101, the methodology utilized to analyze the impact of terrain upon radio wave propagation." Achernar Br. at 1.

[4] This issue, resolved in Achernar's favor by the ALJ, pertains to whether Mullaney deliberately misled the Commission in statements concerning the extent of interference caused to the NRAO facility by the respective applicants.

[5] Insofar as Lindsay suggests that the Board may be exceeding its authority by inquiring into the impact of Lindsay's proposal on the Quiet Zone, we point out that Section 73.1030(a) provides that when an objection is received the Commission "will consider all aspects of the problem and take whatever action is deemed appropriate." The Rule does not require, as the ALJ seems to have believed, *see I. D.*, para. 79, that an application causing interference must be either granted or denied, but only that "appropriate" action be taken. It is our purpose in remanding to consider "all aspects" of the interference in this case, and to ascertain what action is "appropriate" in the context of this unusual proceeding.

In this regard, we note that, at oral argument, counsel for NRAO took the position that it had no right to object to a proposal located outside the Quiet Zone:

> [BOARD MEMBER]: Let me ask you my question, I am troubled by this. If an applicant came in 36.1 miles to the west of your actual operations, you have no protection under this rule, did you say?
>
> [MR. REYNOLDS]: Under this rule I have no right to object to harmful interference that would be caused.
>
> [BOARD MEMBER]: Is it your view that it is only the rule that gives you the right to object to operations in the quiet zone or do you think that you would have had, as a spectrum user, standing under *Sanders Brothers* to object, even if the rule didn't allow you to come in and object; and doesn't the Commission even permit informal objections from responsible parties. You represent a very responsible party here? In other words, is it your position that you have no standing or authority to object to the Lindsay proposal, even though it might wipe out Channel 64 for you equally?
>
> [MR. REYNOLDS]: I can answer that question this way, you certainly have been aware of proposals in the past that were on the other side of the line, the decision has been made not to proceed and object. There are sensitivities. We are concerned that we not stub, step on toes. (TR. 1208, 1219).

Contrary to NRAO's impression, Section 73.3587 of the Commission's Rules, 47 CFR §73.3587, provides that: "Before FCC action on any application for an instrument of authorization, any person may file informal objections to the grant." In view of this specific right created by Commission rule, NRAO's view is too narrow, for indeed it could have objected to both applications now before us; and its objections would receive careful Commission consideration whether filed under §73.1030(a) or under §73.3587.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-420

In the Matter of

BLACK TELEVISION WORSHOP OF LOS ANGELES, INC. File No. BPET-811118KF

Permittee of Noncommercial Educational Television Station KEEF-TV, Los Angeles, CA

Order to Show Cause Why the Permit of KEEF-TV Should Not Be Revoked and Notice of Apparent Liability for a Forfeiture

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. File No. BLET-870225KE

Permittee of KEEF-TV, Los Angeles, CA

For License to Cover Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. File No. BMPCT-870610KU

Permittee of KEEF-TV, Los Angeles, CA

For Consent to Modify Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. File No. BLET-870610KT

Permittee of KEEF-TV, Los Angeles,CA

For License to Cover Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC.

Permittee of KEEF-TV, Los Angeles, CA

For Special Temporary Authority

MEMORANDUM OPINION AND ORDER

Adopted: April 6, 1989; Released April 17, 1989

By the Review Board: MARINO(Chairman), and BLUMENTHAL; Board Member Esbensen absent. Board Member BLUMENTHAL issuing a Separate Statement.

1. On April 5, 1989 the Review Board received a Petition for Extension of Stay filed by Black Television Workshop and Hispanic Christian Communications Network. We will dismiss petitioners' request for the reasons set out below.

2. By *Memorandum Opinion and Order*, FCC 89R-18, adopted March 23, 1989, *recon. dismissed*, FCC 89R-20, adopted March 24, 1989, the Board granted an emergency petition filed by petitioners, and stayed for two weeks (from the adoption date) the commencement of the hearing in this case. The hearing was then scheduled to begin March 27, 1989 in Los Angeles, California. Our principal reason for the stay was the specific representation that the petitioners were in the process of perfecting, and immediately filing, an application (FCC Form 314) seeking Commission consent for the assignment of the construction permit for station KEEF-TV, Los Angeles, California, pursuant to the Commission's minority "distress sale" policy. The two-week period was selected to permit a convenient rescheduling of the hearing in Los Angeles, should the proposed "distress sale" fall through. *See* FCC 89R-18 *supra*, at n. 1. Petitioners now request an extension of the stay until such time as the presiding Administrative Law Judge suspends the procedural dates (as requested in their pending Petition for Suspension of Procedural Dates attached to their instant stay request), or until the procedural dates are (possibly) suspended or stayed by the Commission.

3. In our *Reconsideration Order* (FCC 89R-20), the Board reviewed its authority to act on interlocutory stay requests, and stated:

> Under Section 1.115(h)(2) of those Rules, the Commission may stay the effect of an order taken by delegated authority; and, under §0.365(b) of the Rules, the Review Board is in turn delegated the authority "to act on . . . appeals from other rulings of Administrative Law Judges," notably interlocutory rulings.

Here, petitioner advises that it currently has pending before the ALJ a petition requesting him to "stay" on his own motion the commencement of the hearing, but the ALJ has not acted upon that petition. Hence, because of the fact that the ALJ has not grossly abused his discretion or denied the "stay" petition before him, the instant petition to the Board is premature. We have previously suggested that the ALJ consider deferring the hearing until the Commission addresses petitioners' pending "distress sale" proposal. *But see Shurberg Broadcasting of Hartford, Inc. v. FCC*, No.84- 1600 (D.C. Cir. March 31,1989). No further action on the Board's part is indicated at this time.

4. ACCORDINGLY, IT IS ORDERED, That the petition for extension of stay dated April 5, 1989 by Black Television Workshop of Los Angeles, Inc. and Hispanic Christian Communications Network IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

SEPARATE STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL

For the reasons set out in our previous two *Orders* in this case, the Board granted the appeal of the petitioners from the ALJ's refusal to stay the commencement of hearing sessions so that the Commission might consider their proposed "distress sale". We granted a two-week stay, and suggested that if the proposed "distress sale" had not been acted upon within that period, but remained live before the Commission for disposition, the ALJ on his own motion might consider a further deferral of the initial hearing dates so as to permit considered agency action on the pending "distress sale" proposal.

Before the Commission could act on the petitioners' "distress sale" proposal, and one week into the stay period, the court issued its opinion in *Shurberg Broadcasting of Hartford, Inc. v. FCC*, No. 84-1600 (D.C. Cir. March 31, 1989), effectively holding unconstitutional the "distress sale" limitations on eligible participants. Although it is unknown at this moment whether appeals of *Shurberg* will be taken, or whether the Commission might alternatively respond to the court's action by enlarging "distress sale" eligibility to eliminate the constitutional impediment found therein, *see generally Mid Ohio Communications, Inc.*, 104 FCC 2d 572 at 601, 602 n. 1 (Rev. Bd. 1986)(separate statement)(application for Comm'n review pending), [1] our instant failure to formally extend the prior stay need not necessarily be fatal to the licensee's opportunity to divest. Especially considering the chance timing of *Shurberg*, and the ensuing opening for the Commission to ponder the "distress sale" policy afresh, any relevant change in that policy might well be applied to the instant petitioners, irrespective of when the hearing convenes in this case and regardless of the minority "distress sale" deadlines set out in the administrative policy affirmed in *Stereo Broadcasters, Inc. v. FCC*, 652 F. 2d 1026 (D.C. Cir. 1981).

FOOTNOTE FOR STATEMENT

[1] In that gratuitous footnote, it was humbly suggested that - - in view of the extraordinary increase in value of many broadcast properties over the last decade - - compulsory divestiture (at a reduced price) should become, perhaps, standardized as our most severe sanction, rather than permitting that remedy on an *ad hoc* basis as we do now. *See, e.g., RKO General, Inc.*, (KHJ-TV), 3 FCC Rcd 5057 (1988)(court appeal pending); *cf. Spanish International Communications Corp.*, 1 FCC Rcd 92 (Rev. Bd. 1986), *recon. denied*, 1 FCC Rcd 884, *aff'd*, 2 FCC Rcd 3336 (1987)(court appeals pending). Or, as Commissioner Patricia Diaz Dennis put it in her RKO dissent, if our current policy of refusing to permit substandard or questionable licensees to divest "no longer serves its purpose, we should change it directly." 3 FCC Rcd 5067 at 5068. If it makes universal its "distress sale" policy, the Commission might wish to reserve the harsh and extreme penalties of revocation or non- renewal to its most egregious cases of intentional wrongdoing involving core licensee responsibilities. *E.g.*, 47 U.S.C. §§ 315, 317; 18 U.S.C. §§1304, 1343, 1464; EEO; or other fraud on the public and/or the government.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-341

In the matter of

MTS and WATS Market Structure

Link-Up America, and

Amendment of Part 36 of the
Commission's Rules and
Establishment of a Joint Board

DECISION AND ORDER

Adopted: February 27, 1989; Released: February 27, 1989

By the Commission:

I. BACKGROUND

1. The preservation of universal service is a basic goal of this Commission. Accordingly, we have adopted the recommendation of the Federal-State Joint Board (Joint Board) that we establish a federal assistance program designed to encourage low-income households, that are not on the telephone network, to subscribe to local exchange service by reducing initial service and installation charges.[1] In a Notice of Proposed Rule Making,[2] released on July 18, 1988, we invited comments on revising the eligibility requirements.[3] The proposed rules would, for those lifeline programs for which income eligibility is verified, eliminate two current limitations on the eligibility of potential beneficiaries: (1) that an applicant must have lived at an address where there has been no telephone service for at least three months prior to the date assistance is requested; and (2) that the applicant must not have received this assistance within the last two years. Based on the record in this proceeding, the Joint Board recommended that we adopt the proposed rules.[4]

II. DISCUSSION

2. We hereby adopt the Joint Board's recommendations regarding the revision of the eligibility criteria for the Link-Up program. We also adopt, as our own, the Joint Board's reasoning in support of its recommendations. The record provided in this proceeding shows substantial support for eliminating the non-income eligibility requirements for the Link-Up program when income eligibility is verified. We agree with the Joint Board that it is costly and often infeasible for states and telephone companies to maintain the records necessary to verify the non-income criteria. We also agree with the Joint Board that it is unnecessary to impose the non-income related eligibility criteria for those applicants who have met the requirements of a state-established income test. The income eligibility criteria alone should be sufficient to ensure proper targeting of the program. Thus, we find that it is in the public interest to eliminate two non-income eligibility criteria for programs that verify income. These eligiblity rules are currently foreclosing Link-Up America service to over 15 percent of all applicants, and as the commenters demonstrate, the restrictions have prevented otherwise eligible persons from receiving benefits. We intend, as the Joint Board recommended, to continue to monitor the Link-Up program to determine the effect of the revised rules on participation in and the costs of the program.

III. ORDERING CLAUSES

3. Accordingly, IT IS ORDERED, that the recommendations of the Federal-State Joint Board concerning federal assistance measures to aid low-income households in obtaining telephone service through the Link-Up America program ARE ADOPTED.

4. IT IS FURTHER ORDERED, that Part 36 of Title 47 C.F.R. of the Commission's Rules IS AMENDED as set forth in Appendix A.[5] The Rules are effective with their publication and release date.

5. IT IS FURTHER ORDERED, that this proceeding is hereby terminated.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Part 36 of Title 47 C.F.R. is to be amended as follows:

1. The AUTHORITY for Part 36 continues to be Sections 4, 201, 202, 203, 205, 218, 221(c), 403, and 410(c) of the Communications Act of 1934 as amended, 47 U.S.C. Sections 154, 201, 202, 203, 205, 218, 221(c), 403, and 410(c).

2. Section 36.711 is amended by revising the introductory text of paragraph (a), by revising the remaining paragraphs.

Section 36.711 Lifeline Connection Assistance.

(a) For purposes of this subpart, Lifeline Connection Assistance shall describe the following lifeline telephone assistance for eligible residential subscribers as defined in Sections 36.711 (b) and (c):

(1) * * *

(2) * * *

(b) In order to be eligible for assistance when income is verified, a residential subscriber must:

(1) meet the requirements of a state established income test; and

(2) not be a dependent for federal income tax purposes as defined in 26 U.S.C. Section 152 (1986) unless the subscriber is more than 60 years of age.

(c) In order to be eligible for assistance when income is not verified, a residential subscriber must meet the eligibility criteria in Sections 36.711(b)(1) and 36.711(b)(2) and:

(1) have lived at an address where there has been no telephone service for at least three months immediately prior to the date that the assistance described in Sections 36.711(a)(1) and/or Section 36.711(a)(2) is requested from the telephone company; and

(2) not have received assistance pursuant to Sections 36.711 (a)(1) and/or Section 36.711(a)(2) within the last two years, with receipt of such assistance to be measured from the date of initiation of the telephone service for which assistance was provided.

(d) Charges assessed for commencing service include any state tariffed charges levied for connecting a subscriber to the network. These charges do not include security deposit requirements.

3. Section 36.721 is amended by revising paragraph (a).

Section 36.721 Telephone company eligibility for lifeline connection assistance expense allocation.

(a) * * *

(1) Must provide Lifeline Connection Assistance as defined in Sections 36.711(a)(1) and/or 36.711(a)(2) to eligible subscribers as defined in Sections 36.711(b) or 36.711(c);

(2) Shall verify that subscribers meet the eligiblity criteria set out in Section 36.711(b) or Section 36.711(c) provided that:

(i) * * *

(ii) If the eligiblity criterion in Section 36.711(b)(1) is verified, then the criteria in Section 36.711(c) shall not apply;

(iii) If the eligibility criterion in Section 36.711(b)(1) is self-certified, then the eligibility criteria in Section 36.711(c)(1) and 36.711(c)(2) shall apply and must be verified;

(iv) In all cases, the eligibility criterion in Section 36.711(b)(2) may be self-certified.

(3) Shall file information with the Commission Secretary demonstrating that it is eligibile for the additional interstate expense adjustment.

(b) * * *

FOOTNOTES

[1] MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, 2 FCC Rcd 2953 (1987) (*Report and Order), reconsideration*, 3 FCC Rcd 4543 (1988). The federal assistance program is known as "Link-Up America" (Link-Up).

[2] MTS and WATS Market Structure, Link-Up America, and Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 3 FCC Rcd 4534 (1988).

[3] The present rules provide that an applicant must:

> (1) have lived at an address where there has been no telephone service for at least three months; (2) not have received Link-Up assistance within the last two years; (3) not be a dependent for federal income tax purposes, unless older than 60 years of age; and (4) meet the requirements of a state-established income test. Assistance is available for one telephone line per household at the applicant's principal place of residence. *Report and Order*, 2 FCC Rcd at 2955-2956; 47 C.F.R. § 36.711(b)(1)-(4).

[4] MTS and WATS Market Structure, Link-Up America, and Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 88-341, FCC No. 89J-2, (released January 31, 1989) (*Recommended Decision and Order)*.

[5] In conformance with the recommendations of the Joint Board, Section 36.711 is revised to reflect the Rule changes. We have also revised Section 36.721 to more clearly indicate that the rule excluding dependents under 60 years of age may be self-certified by the applicant. This action is taken pursuant to Sections 4, 201, 202, 203, 205, 218, 221(c), 403, and 410 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 201-203, 205, 218, 221(c), 403, and 410(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Cellular Applications
for Unserved Areas in
MSAs/NECMAs

ORDER

Adopted: April 6, 1989; Released: April 10, 1989

By the Chief, Common Carrier Bureau:

1. The Commission has received several mutually exclusive applications to serve areas within Metropolitan Statistical Areas/New England County Metropolitan Areas (MSAs/NECMAs) that remain unserved after the expiration of the five year fill-in period during which cellular licensees are permitted to modify their Cellular Geographic Service Areas (CGSAs). 47 C.F.R. Section 22.31 (a)(1)(i).[1]

2. Petitions to deny some of these applications have been filed, alleging that the applications are premature because they were filed prior to any Commission notice of either when the five year fill-in period had expired or when such applications must be filed. The petitions also raise issues regarding what requirements are applicable for cellular applications for unserved areas after the five year fill-in period. For the reasons set forth below, we conclude that these petitions are correct and are dismissing the subject applications without prejudice.

3. At various stages in the cellular Rule Making proceedings, the Commission has considered how applications for unserved areas within MSAs should be processed. Initially, it stated that after all initial filing periods had lapsed for the filing of cellular applications in both MSAs and non-MSAs (the rural service areas (RSAs)), it would "establish an opening date for the filing of applications for any remaining areas."[2] The need to establish any such filing date was delayed when the Commission subsequently concluded a Rule Making that codified its MSA fill-in policy, which provided MSA licensees five years within which to file fill-in applications to expand their CGSAs in their respective markets without being subject to competing applications.[3] In the *Second Report and Order*, the Commission in addition, codified its date certain policy for the filing of cellular applications, providing that applications "may only be filed on the dates specified by the Commission." 47 C.F.R. Section 22.6(b)(3). The Commission has not yet set the dates for filing applications for unserved areas after the end of the five-year fill-in period. The Commission stated that it would establish at a later date a process for selecting applications for unserved areas after the five year period.[4] In short, the Commission has yet to establish procedures for accepting, processing, and selecting applications for any areas that have not been applied for at the conclusion of a particular MSA market's five year fill-in period.

4. In light of the above, the applications seeking authority to serve those areas in MSAs that remain unserved after the expiration of the cellular licensee's fill-in period are premature.[5] Consequently, they will be returned, and the applicants will be afforded an opportunity in the future to refile their applications in accordance with whatever substantive requirements and procedures the Commission ultimately adopts. A Rule Making proceeding will be commenced in the near future to consider the appropriate processing and selection procedures, as well as substantive requirements, for applications proposing to serve any areas that remain unserved, either in MSAs or RSAs, at the termination of a particular market's fill-in period.

5. This order does not affect applications filed by existing licensees to modify or expand their CGSAs within the five-year fill-in period pursuant to the Commission's fill-in policy under Section 22.31 (a)(1)(i). Once that period has expired, however, licensees who want to apply to expand their CGSAs will not be permitted to do so until the Commission announces that applications for remaining unserved areas may be filed.

6. We are creating one limited exception to this policy. Section 22.31 (a) (1) (i) currently provides the authorized wireline and non-wireline carrier in a market the right to file applications for unserved areas in an MSA for a period of five years from the date the first construction authorization in that MSA is granted without being subject to mutually exclusive applications. 47 C.F.R. Section 22.31 (a) (1) (i). A Petition for Reconsideration of this rule, adopted in the *Second Report and Order*, has been filed arguing the five year fill-in period is unfair to the second authorized licensee in the MSA because it will have less than the five years its competitor received to expand its system.[6] The petitioner requests that the five year fill-in period for the second-authorized licensee in each MSA market commence with the issuance of that licensee's construction authorization.

7. Since the Commission has not made a decision on this petition, we consider it essential that second-authorized licensees be given the opportunity to perfect any rights the Commission may wish to afford them during the actual five year period commencing with the grant of their own construction authorization. Otherwise, should the Commission decide to grant the petition, the Commission may have to give the second-authorized licensees additional time -- the difference between the time of the grant to the first licensee and the second licensee -- at some later date for the filing of any additional fill-in applications. Because some second-authorized licensees are nearing the five year anniversary of the construction authorization, adding on additional fill-in time at a later date may, in effect, provide them with more than five years to modify and expand their system. We wish to avoid such additional delay. Therefore, second-authorized licensees may perfect any rights that a five year fill-in period based upon their own construction authorization would give them.

8. Therefore, fill-in applications from the second-authorized carrier in an MSA market may be filed up to five years from the date it received its grant of a construction authorization. Any such applications that are filed by the second-authorized carrier (notwithstanding the fact that the filing occurs after five years from the date of the construction authorization granted to the first-authorized carrier in a market) will be retained on file but will not be accepted for filing or processed pending a decision on the petition for reconsideration. If the petition for reconsideration is granted, we will process any such fill-in

applications. If the petition for reconsideration is denied, any such fill-in applications will be returned. This approach will protect the rights of applicants should the reconsideration petition be granted, without in any way prejudicing the Commission's decision on the reconsideration petition.

9. Accordingly, IT IS ORDERED, that cellular applications for unserved areas after the expiration of the five year fill-in period will be returned without prejudice as untimely filed. Pending completion of a Rule Making establishing processing and selection procedures, as well as substantive requirements, for applications to serve unserved portions of MSAs or RSAs after the expiration of a market's five year fill-in period, any such applications, with the limited exception noted in paragraphs 4-6 *supra*, will be dismissed.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Section 22.31 (a)(1)(i) specifically refers to the date of the first construction permit. Because construction permits are no longer issued in the Public Mobile Services we construe that rule as running from the date of the initial authorization granted to the tentative selectee.

[2] *Cellular Lottery Rule Making*, 98 FCC 2d 175, 204, 205 & n. 81 (1984); *Cellular Radio Service (Lottery Selection)*, 58 Rad. Reg. 2d (P&F) 677, 688 (1988); *affirmed in part and reversed in part, Maxcell Telecom Plus, Inc. v. F. C. C.*, 815 F.2d 1551 (D.C. Cir. 1987). Additionally, the Commission indicated that these applications would be processed using regular notice and cut-off procedures. *Cellular Lottery Rulemaking*, 98 FCC 2d at 205 and n. 81.

[3] In order to establish clear notice of the expiration of each market's fill-in period, the Commission indicated that it would issue a public notice listing the initial construction authorization dates for all 305 MSAs. We have issued that public notice concurrently with this order. *See Second Report and Order*, CC Docket No. 85-388, 2 FCC Rcd 2306 (1987).

[4] *Second Report and Order*, 2 FCC Rcd at 2309. In addition, the Commission stated that it would "announce later when the fill-in applications must be filed for each MSA." Id. at n. 17. Although the term "fill-in" is confusing in this context, because it was used in reference to the filing of applications after the termination of the cellular licensee's five year fill-in period, the obvious intent was to refer to applications for unserved areas within an MSA at the expiration of the five year fill-in period.

[5] Some of these applications were erroneouly placed on public notice. Placing an application on public notice is not an indication that the application ultimately will be found acceptable for filing. *See* 47 C.F.R. Section 22.26(b).

[6] Section 22.31(f) provides that rural cellular service licensees will be afforded a five year fill-in period that commences with the grant of the original construction authorization for the licensee's own system, rather than with the grant of the first construction authorization in the particular RSA market. *See* 47 C.F.R. Section 22.31(f).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Annual 1989 Access Tariff Filings

MEMORANDUM OPINION AND ORDER

Adopted: March 22, 1989; Released: March 22, 1989

By the Chief, Common Carrier Bureau:

I. EXECUTIVE SUMMARY

1. In their annual access tariff filings, the local exchange carriers (LECs) are required to file just and reasonable rates that comply with Commission Rules and recover no more than their allowed rate or return. In these 1989 access tariff filings the LECs also implement several rule changes relating to the recovery of common line costs and programs to help to defray costs of serving high cost areas and low income subscribers. Based on these Rules, and their own projections of changes in cost and demand, the LECs proposed to reduce the carrier common line (CCL) charges on aggregate by $333 million, other switched access charges by $130 million, and special access by $26 million.

2. Our review of the tariffs filed to be effective April 1, 1989, has nonetheless disclosed various specific instances in which unlikely or erroneous projections would, if not corrected, produce excessive rates. The industry's projection of demand also requires some correction. While the LECs for the most part appear to have used reasonable methodologies to project demand, more recent actual demand data indicate that those projections understate likely demand. Their projections of demand also do not reflect the full stimulation of demand to be expected from long distance rate reductions during the period these rates will be in effect.

3. These long distance rate reductions result in part from corrections to LEC cost estimates. In many instances, the LECs appear to have overestimated the amount of their inside wire costs attributable to regulated services and their depreciation expenses. In addition, a statistical analysis of LEC projections of investment and expenses indicates LECs have forecast unusually high growth rates which are not adequately explained or justified in their support information.

4. As in prior years, and based upon our examination of the entire record developed in the course of the tariff review process, we have calculated adjustments to correct LEC rates. The adjustments are described in detail in this Order. These disallowances total $705 million, or 3.6 percent. Based upon these disallowances in costs and adjustments to demand, we have calculated Rate Adjustment Factors to correct excessive LEC access rates. LEC rates, as adjusted by these factors in accordance with the procedures specified in Section VIII, *infra*, will become effective on April 1.

II. INTRODUCTION

5. This Order describes our review of proposed revisions to rates for access to local telephone facilities and services provided by local exchange carriers. To understand these revisions, and the material filed by the LECs in support, it will be useful to review the basic rate methodology mandated by the Commission's access charge rules.

6. Essentially, access rates are intended to reflect the underlying costs of originating and terminating interstate, interexchange services. Access rates are therefore developed from basic cost data by a sequence of procedures, each governed by Commission Rules. Actual company expenses, investment, and revenues are first booked according to the Uniform System of Accounts (USOA) in Part 32 of the Commission's Rules. Items associated with nonregulated activities (*e. g.*, sale or lease of customer premises equipment and non-telephone company businesses) are removed in accordance with Part 64 of the Rules and the cost allocation manuals filed by the carriers in accordance with those Rules.

7. The remaining regulated amounts are then separated to apportion costs and revenues between the state and the interstate jurisdictions in accordance with the Separations Manual, contained in Part 36 of the Rules. Intrastate costs are recovered by rates subject to regulation by state or local regulatory bodies. Costs apportioned to the interstate jurisdiction are correspondingly subject to regulation by the Commission. A portion of the interstate costs should be recovered by other non-access services.

8. Costs associated with interstate access are distributed to individual access rate elements specified in Part 69 of the Rules and specific access rates are then calculated, generally by dividing these costs by the anticipated demand. The LECs in each case project the costs and demand for the relevant period, and are required to target the rates to earn no more than their authorized rate of return, currently 12.0 percent.

9. Carriers filing access tariffs are usually required to refile these tariffs each year upon not less than 90 days' notice to update the cost and demand data used to compute rates, and to implement changes in the access rules and other applicable regulations. The filings must include the same justification and cost support required of other dominant carriers.[1] This includes a past-year cost of service study and a projection of costs.[2] As part of these support data, carriers are required to provide certain basic data in a consistent format established by the Commission's Tariff Review Plans (TRPs). [3] All requests for waivers of TRP requirements or Commission Rules were to be submitted prior to the filings and waivers found to be justified were granted in Annual 1989 Access Tariff Filings, DA 88-1872, released Dec. 2, 1988 (*Waiver Order*).

10. In recent years, the revised tariffs were filed to be effective January 1. This year, the Commission has revised this schedule and directed that the tariffs be filed to become effective April 1, 1989.[4] Moreover, because the permanent date for annual access tariff filings will be July 1 of each year beginning in 1990, the pending tariffs will remain in effect for 15 months (although the LECs are free to present mid-course revisions and corrections may be directed in certain circumstances).

11. In addition to this change in filing schedules, the access tariffs this year implement a number of important changes of substance.

A. ***Implementation of Individual LEC CCL Rates***

12. Non-traffic sensitive (NTS) plant, which consists primarily of the poles, wires, conduit, and other facilities used to provide the telephone "loop" to local customers, is by far the largest interstate access cost element.[5] In the past, these costs have been pooled in the Common Line (CL) pool administered by the National Exchange Carrier Association (NECA) and recovered by access rate elements assessed either directly upon local subscribers in the form of subscriber line charges and special access surcharges or by the Carrier Common Line (CCL) charge. LECs have always been permitted to file individually computed subscriber line charges, but the CCL charge was a single set of nationwide rates computed by NECA. The pooled CCL rate was assessed primarily on interexchange carriers (ICs), who in turn recovered the charge from their customers through interstate long distance rates.

13. Effective April 1, the Commission's *NTS Recovery Order* [6] now permits individual LEC CCL rates based primarily upon individual LEC costs, but as part of a program of continuing support to high cost LECs. Under this program, Transitional Support (TRS) is collected from lower cost telephone holding companies that elect to file their own CCL rates. TRS funds are collected and disbursed by NECA. Individual LEC CCL rates also reflect Long Term Support (LTS) obligations which are assessed to assure that the CCL rate of LECs who remain in the NECA CL pool will be no higher than the national average CCL rate. Administratively, LTS assessments are computed by NECA based upon the national average CCL rate; NECA reports the results of this calculation to each LEC filing its own CCL rate, and each LEC in turn bases its CCL rate on a combination of its LTS contribution and its own common line revenue requirement. The pending tariffs represent the first implementation of individual CCL rates, and of the support program.

B. ***Universal Service Fund and Lifeline Assistance***

14. The *NTS Recovery Order* also revises the method used to support the Universal Service Fund (USF) and Lifeline Assistance (LA) program. The USF is designed to maintain local rates in high cost study areas lower than would otherwise be necessary, to help assure that service continues to be provided in those areas at rates that are not unduly high. The LA program provides assistance to help low income persons afford telephone service. It funds the "Link Up America" program to defray or defer the costs of installing service, as well as offsetting all or part of the federal subscriber line charge of $3.50 for qualified households. These programs have until now been funded as part of the CL revenue requirement. The *NTS Recovery Order* modified certain eligibility requirements for USF and LA, and also revamped the funding mechanism. Under the revised Rules, NECA develops, bills, and collects flat monthly charges from ICs to provide the funds for these programs.

C. ***Alternative Filing Procedures for Small Telephone Companies***

15. Effective with this annual filing, the Commission has also established simplified and reduced access tariff filing requirements for the traffic sensitive (TS) rates of small telephone companies.[7]

D. ***Strategic Pricing Order***

16. In the *Strategic Pricing Order*,[8] the Commission adopted guidelines for the so-called "strategic" pricing of special access services. For High Capacity (HiCap) DS-1 service, specifically, it adopted a guideline that rates outside a range from four to eight times the rate for a voice grade facility would be presumed to be unreasonable. Absent substantial justification, such rates would be subject to suspension and investigation or other action.

E. ***Part 69 Conformance Reconsideration Order***

17. On December 12, 1988, the Commission released the *Part 69 Conformance Reconsideration Order*,[9] which revised Part 69 of the Commission's Rules to conform Part 69 to the recently revised Uniform System of Accounts and Separations Manual, and in some instances granted petitions for reconsideration and clarification. The LECs were directed to implement this Order in their annual 1989 access tariff filings.[10] However, because the LECs had essentially completed development of their access filings by that date, the Bureau allowed the LECs to implement this Order, as well as corrections to their filings, in errata filings.

III. HISTORICAL RESULTS AND TRENDS UNDER CURRENT TARIFFS

18. Submission by the LECs of accurate historical results serves three important purposes in our review. First, the historical results provide a baseline from which to identify and evaluate the incremental changes projected by the LECs in the test year during which the rates will be in effect. Second, the historical results provide information necessary to evaluate the reliability and accuracy of earlier forecasts and of the Commission's own review and adjustments to proposed rates. LECs whose forecasts were inaccurate in earlier years warrant special scrutiny, especially if they have consistently forecast inaccurately high costs or low demand. And third, as additional data are added year by year, the Commission, the LECs, and the public acquire the ability to identify and monitor industry trends, both in aggregate and for individual LECs.

19. In the *TRP Order*, the Bureau established a common baseline, past year cost of service (PYCOS) period of January 1, 1988, to September 30, 1988, annualized, and a forecasted test year period of April 1, 1989, to December 31, 1989, annualized. The data submitted for the PYCOS period demonstrate that the LECs overall earned generally high returns for the access elements in their tariffs, above the allowable 12.0 percent level. These results are summarized for the Bell Operating Companies in the accompanying Table.

Past Year Cost of Service Study Rates of Return Tier One Companies, January through September 1988

	Total TS Rate of Return Switched and Special Access	Total Return Reg. Interstate Access
Bell Atlantic	14.52%	13.45%
Cincinnati Bell	18.90%	16.20%
Ameritech		
Ill. Bell	7.65%	9.22%
Ind. Bell	11.24%	10.34%
Mich. Bell	13.02%	12.91%
Ohio Bell	14.30%	13.78%
Wisc. Bell	8.93%	11.99%
BellSouth		
Florida	11.18%	11.71%
Georgia	12.22%	12.16%
North Car.	13.16%	12.59%
South Car.	17.39%	14.60%
Alabama	11.76%	11.97%
Kentucky	12.80%	12.49%
Louisiana	16.16%	14.06%
Mississippi	13.97%	12.98%
Tennessee	14.31%	13.29%
NYNEX		
New England	12.84%	12.42%
New York	12.79%	12.50%
SNET	10.26%	11.00%
Southwestern	14.29%	13.19%
Pacific Telesis		
California	14.84%	14.37%
Nevada	15.94%	12.87%
US West		
Mountain States	12.69%	12.40%
Northwestern Bell	12.58%	12.27%
PNB	11.74%	12.07%

IV. THE PRESENT FILINGS

20. The most important changes in the present filings concern common line charges. As discussed above, these filings implement the final stage of the subscriber line charge program by increasing the residential and small business subscriber line charge by $.30 to $3.50. This shift correspondingly reduces the common line revenue requirement to be recovered by CCL charges. The CCL rate is also reduced because USF and Lifeline costs are now to be recovered directly from ICs by flat charges reflecting the IC's share of presubscribed lines. The USF and Lifeline revenue requirement totals $320 million. Taking into account this removal of revenue requirement from the CCL rates, the proposed reduction in the terminating CCL rate from the 3.39 cents per minute rate effective at the time these tariffs were filed to the 2.09 cent per minute terminating rate[11] and one cent originating rate represents an overall reduction in CCL rates of about $333 million. That reduction is reflected in the individual, depooled CCL rates that Tier 1 LECs submitted in these filings for the first time.

21. The Tier 1 LECs also proposed reductions in other switched access rate elements. For the switched access elements (except Directory Assistance) these total $130 million from rates as of January 1, 1989.[12] Special access rates would be reduced by $26 million below rates in effect on that date.

22. Petitions and replies relating the the proposed access tariffs were received according to the normal schedule for tariff filngs in Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773. We also recognized, however, the special difficulties presented by these filings, the late submission of some support material and corrective errata, and the limited statutory period within which the Commission must conclude its initial review of the transittals and comments. We therefore decided to allow one further round of supplemental comments following the LEC replies.[13]

23. When we established filing requirements for the carriers errata filings, we stressed that we did not anticipate accepting further submissions subsequent to the comments on the errata filings.[14] Nevertheless, five carriers filed responsive pleadings which we dismiss as unauthorized pleadings in accordance with Section 1.45(c) of the Commission's Rules.[15] Petitioners generally argue that, although the LECs have reduced their access rates from the currently effective levels, these rates remain too high. These arguments, and the LECs' responses thereto, are discussed in detail in the Sections that follow.

V. ANALYSIS AND DISCUSSION

A. *Uniform System of Accounts*

1. Petitions

24. AT&T contends that US West has improperly assigned costs among the COE Transmission and COE Switching separations categories. In particular, AT&T asserts that US West's COE Transmission and COE Switching cost assignments do not remain consistent across its TRP reports, although the sum of these amounts (Total COE) does. Instead, AT&T argues, US West has increased the cost assignment to the COE Transmission separations category, while decreasing the cost assignment to COE Switching. According to AT&T, this results in overstatement of the interstate cost assignment to Transmission, and understatement of the interstate cost assignment to Switching. In addition, AT&T contends that since the interstate separations factor applied to increased Transmission cost is greater than that applied to decreased Switching cost (40 percent to 25 percent), US West's total interstate cost and revenue requirement are overstated by $26.3 million and $8.2 million, respectively.[16]

2. Replies

25. US West explains that even though there is parity between the "as accounted" and the "as categorized" amounts at the total COE level, the individual COE Switching and Transmission categories cannot be consistent. According to US West, AT&T's comparisons are erroneous because they compare Part 32 and Part 36 data which in fact are not comparable. The alleged errors exist only because AT&T has confused the use of the terms "Switching" and "Transmission". US West indicates that although in both Parts 32 and 36 the words "switching" and "transmission" are used, the words have different meanings. Specifically, investment dollars in accounted switching or transmission accounts do not equal investment dollars in categorized switching or transmission. US West acknowledges that this difference is not apparent in its historical data but states that it was noted in the footnotes section of each form.[17]

26. US West indicates that it has restated the COS-1(P), Part 36, "as categorized" view, and the COS-1(P), "as accounted" view, to enable a valid comparison. In its opinion, this new exhibit (Exhibit 3), clearly demonstrates comparable COE Switching and Transmission data for the historical and prospective periods. [18]

3. Discussion

27. We have reviewed the tariff filings, the petition, and the reply and are not persuaded that any compelling argument has been presented that a disallowance or an investigation of these costs is appropriate. We do not agree with AT&T's contention that COS-1 and COS-8 data should match, or that any mismatch indicates a misallocation of the investment.

B. *Nonregulated Activities*

28. Part 64 of the Commission's Rules establishes standards for separating the costs of the nonregulated activities of telephone companies and their affiliates from the costs of the regulated telephone services they provide. Misassignment of costs to the regulated sphere would generate excessive access rates. Tier 1 LECs are required to file, for approval, cost allocation manuals (CAMs) in compliance with these Rules and to include nonregulated costs in their ARMIS reports.

1. Overall Issues

29. AT&T notes that a comparison of forecast and actual 1988 nonregulated operating expense demonstrates that the LECs in the aggregate underforecasted these expenses substantially. Because these forecasts were so inaccurate, AT&T urges that the forecasts submitted for 1989 warrant special scrutiny, as the Bureau has recognized in considering LEC filings in prior annual filings.[19] NYNEX states in reply that 1988 forecasts were made at the same time that new accounting rules were being implemented and were prior to Commission approval of its CAM. It argues that given these circumstances, the forecast results for 1988 have no relevance to the 1989 forecast.[20] LECs also argue that the CAMs are a comprehensive system of cost apportionment and accounting principles, and that they report these results quarterly and file an independent auditor's report annually.[21]

30. We decline to accept the arguments of NYNEX and other LECs on this point. The track record which a LEC establishes in forecasting its expenses, especially such critical forecasts as of its nonregulated costs, is a legitimate and important consideration in assessing the likely accuracy of its forecasts for the future. As AT&T observes, virtually all the major LECs underforecasted their 1988 actual nonregulated expenses, often committing large percentage errors. Among the Regional Bell Operating Companies, for example, only Pacific slightly overforecasted its nonregulated expenses. While the LECs may have faced some difficulties in developing accurate forecasts, it is at least highly doubtful that these systematic underforecasts are so easily explainable. The fact that the actual results are later reported and audited also provides no assurance that the projections of nonregulated costs in the future will be accurate, as last year's inaccurate projections demonstrate. We accordingly have given special scrutiny to the forecasts of the carriers listed below, who submitted forecasts which proved erroneous in 1988.

LEC 1988 Nonregulated Operating Expenses Forecasts and Actuals ($000)

	Forecasted	Actual	Understatement
US West	89,388	141,432	52,044
GTOC	442,885	526,809	83,924
Bell Atlantic	118,679	190,446	71,767
NYNEX	122,411	165,199	42,788
BellSouth	152,625	176,101	23,449
Southwestern	52,641	75,307	22,666
Ameritech	123,703	140,233	16,530

(Source: 1988 Annual Access Filings, TRP, COS-1(P)32, Col. A, Rows 200-230, 250, 270, 320, and 1989 Annual Access Filings TRP, COS-1(H), Cols. A&B, Line 290. AT&T Petition, App. E at 3. GTOC's forecasted expenses are based upon its statement in its reply that it forecasted 7.02 percent of total company expenses.)

31. AT&T also observes that the Tier 1 LECs as a group project growth in nonregulated plant in service that is more than twice as great as projected growth in expense (13.9 percent to 6.37 percent), although these figures are typically very similar. AT&T argues that this disparity suggests that nonregulated expenses are understated, resulting in overassignment of about $121 million in expense to regulated activities. US Sprint similarly contends that a number of LECs assume that the ratio of nonregulated to regulated expenses will remain constant or decline, when nonregulated activities are an increasing percentage of carrier revenues and costs.[22] Both AT&T and US Sprint argue that the BOCs have provided inadequate justification for their projections of nonregulated costs.

32. The LECs reply that growth in plant is not necessarily closely correlated with growth in expenses, especially for nonregulated activities which may not have the same characteristics as regulated.[23] These points may be well taken, but the LEC filings overall present a troubling pattern of failing to present any positive basis for their projections of nonregulated costs. In some cases, the LECs essentially project the same ratios of nonregulated expenses to total expenses as in 1988, or even lower ratios in particular categories. In view of the fact that LECs are overall expanding their nonregulated activities, such forecasts are questionable. Where it is possible to identify reasonable corrections, as discussed below, we have computed them. Moreover, we will continue to give close scrutiny to the accuracy of LEC forecasts of nonregulated expenses in future filings as we develop a longer baseline from which to evaluate such forecasts. The petitions and our own review also raise the following issues on a carrier-by-carrier basis. The manner in which LECs have complied with Part 64 requirements in connection with their allocation of inside wire costs is addressed separately in Section V.B.9, *infra*.

2. US West

33. US Sprint[24] notes that US West projects a 12.0 percent decrease in its nonregulated plant specific expenses and a 15.3 percent decrease in plant non-specific expenses at a time when the total company expenses are increasing by 3.03 percent and 1.31 percent, respectively. US West replies that the estimate for plant-specific ex-

pense was based on a forecast of the volume of work to be performed and states that "it is possible for these expenses to decline if the projected volume of work decreases."[25] The increase in total company-plant specific expense is said to be due in large part to a Commission rule change allowing expensing of items from $200 to $500 that were formerly capitalized. The decrease in nonregulated plant non-specific expenses is said to correspond to the decrease in plant-specific expenses, because this expense category is primarily comprised of support functions for plant-specific activities.

34. US West does project an overall increase in nonregulated expenses and, as it indicates, there are plausible reasons for declines in specific categories of expense as well as for extraordinary increases in regulatory expenses. We see no adequate basis for disallowaance, although as we have indicated, we will monitor the accuracy of such projections in future filings.

3. GTOC

35. AT&T asserts that GTOC understates its nonregulated expenses, noting that this was the case in 1988 and that the 0.4 percent reduction is inconsistent with a 17 percent increase in its assignment of plant in service to nonregulated.[26] It also notes that GTOC (Florida) has increased its regulated marketing expense by 27 percent but decreased its nonregulated marketing expense by 22.8 percent.[27]

36. GTOC contends that its 1988 forecast that nonregulated expense would be 7.02 percent of total company expenses was comparable to the actual 7.99 percent. It also claims that there is no direct correlation between growth in nonregulated plant in service because the allocation of common costs to nonregulated operations is based upon specific studies or wages. In the case of Florida, GTOC replies that it has transferred two operating groups which had nonregulated marketing expenses in 1988 to a GTOC nonregulated affiliated company. A similar transfer occurred for GTOC (Hawaii). GTOC appears to have adequately supported the alleged inconsistencies.

4. Bell Atlantic

37. US Sprint and AT&T[28] include Bell Atlantic generally among LECs who may have underassigned costs to the nonregulated category. AT&T and MCI[29] note specifically that Bell Atlantic has failed to directly assign nonregulated costs to Materials and Supplies, Account 1220.

38. Bell Atlantic replies that it has projected nonregulated expenses in 1989 at the same percentage as in the PYCOS period (2.8 percent); average net investment would increase from 0.32 percent to 0.39 percent. These are said to represent equitable allocations. The failure to assign nonregulated costs to Account 1220 is said to reflect the fact that Bell Atlantic has a separate subsidiary which deals with the provision of CPE; Bell Atlantic states that there were also no such costs assigned in the historical data.

39. While Bell Atlantic's track record is unimpressive and its projection that its nonregulated activities will essentially grow no faster than regulated activities may well be questioned, we do not find adequate grounds for rejecting Bell Atlantic's forecast on the present record. Bell Atlantic appears to have explained adequately its allocations to Account 1220.

5. NYNEX

40. AT&T claims that NYNEX's forecast of a decrease in nonregulated marketing expense is an unexplained anomaly and inconsistent with NYT's assertion that its regulated marketing expenses were increased to handle competition.[30] MCI claims that some LECs have improperly assigned Executive and Planning Expenses and questions a 5.99 percent decline in nonregulated external relations expenses while corresponding regulated expenses are increased by 14.11 percent.[31] US Sprint similarly questions a decrease in NET's nonregulated customer operations expense while the regulated category is increasing.[32]

41. NYNEX explains that NYT's nonregulated marketing expense is projected to decline solely because it incurred $8.3 million in expenses in 1988 introducing one product and that this introduction period is completed. The declines noted by MCI and US Sprint are said to be due to the implementation of changes in the NYNEX CAM, as ordered and approved by the Commission.[33] These explanations appear to reconcile the claimed inconsistencies.

6. BellSouth

42. BellSouth explains in its documentation that it intends to recombine its nonregulated CPE operations into its two operating companies. It describes the processes and models used in applying its CAM to this revised corporate structure to assign costs to nonregulated activities such as those associated with CPE.

43. AT&T contends that BellSouth erred in directly assigning all advertising expenses in Account 6613 to either regulated or nonregulated, when some generic advertising should be allocated by means of the Commission's marketing allocator. Moreover, it notes that for Southern Bell, no advertising expense is assigned to nonregulated activities.[34] AT&T also argues that BellSouth has forecasted a decline in expenses assigned to nonregulated activities other than CPE from $176.1 million in the PYCOS period to only $26.2 million in the test period.[35]

44. BellSouth replies that it correctly assigned all advertising expenses in Account 6613 directly to either regulated or nonregulated, and states that generic advertising expenses are included and allocated as appropriate in Account 6722. BellSouth concedes, however, that for Southern Bell the assignment of all advertising expenses to regulated activities was erroneous. It states that total regulated expenses were overstated by $950,000, of which the interstate portion is $255,000.

45. BellSouth defends its projections of "nonregulated-other" expenses, which it claims are much higher than AT&T's figure. While it does not present a specific figure, it estimates the amount at $169 million and asserts that it will monitor its projection and amend its annual filing to adjust it if warranted.[36]

46. The error made in Southern Bell advertising expense assignment must of course be corrected and BellSouth is ordered to make the necessary adjustment as shown in Appendix B. BellSouth's explanation of its other advertising expense assignments and of the nonregulated-other expenses appears adequate.

7. Southwestern

47. AT&T questions Southwestern's projected 2 percent ($1.6 million) reduction in nonregulated expense in 1989 and attributes this to a failure to assign materials and supplies, Account 1220, to nonregulated.[37] MCI complains that Southwestern increased regulated expenses in the External Relations account by 10.81 percent but reduced nonregulated expenses by 5.99 percent.

48. Southwestern states that the projected decrease in nonregulated expense reflects the fact that in preparing its tariff it used information from the first six months of 1988, while the TRP data included information for the first nine months of 1988, and nonregulated expenses increased during the third quarter of 1988. It claims that this anomaly does not have a substantial effect on its interstate revenue requirement; using data for the first eleven months of 1988 and applying these data to the 1989 budget would, Southwestern claims, reduce its interstate revenue requirement by about $881,000. It presents a similar response to MCI, stating that it had determined its revenue requirement using six months data prior to compiling the TRP. Southwestern concedes that it inadvertently omitted assigning a portion of Account 1220 as nonregulated. It calculates the total effect as a $124,000 overstatement of interstate revenue requirement including federal income tax effects.

49. The fact that Southwestern's use of data for the first half of 1988 fails even to adequately predict growth in nonregulated expenses for the second half plainly raises substantial reason to doubt that it will be valid for 1989. Indeed, it would probably be appropriate to project that nonregulated expenses will continue to grow in relation to the company total. As a conservative adjustment we will reduce Southwestern's revenue requirement by the amount it has calculated and by the amount of the agreed overstatement, a total of $1.005 million as shown in Appendix B.

8. Ameritech

50. AT&T raises a similar issue regarding Ameritech, claiming that its projected nonregulated expenses do not reflect actual results in the PYCOS period.[38] Ameritech replies that while it used only results from the first six months of the year, it projected growth in nonregulated expenses above the level implied by the PYCOS data (2.22 percent test year expenses *vs.* 2.19 percent). In addition, errors in the historical PYCOS data are claimed to result in even higher projected growth over the PYCOS historical data.[39] Overall, we do not find substantial grounds for revising Ameritech's projections.

9. Inside Wire Costs

a. Introduction

51. Over the past several years, the Commission has preemptively detariffed the installation and maintenance of all inside wiring.[40] The detariffing of the installation of simple inside wiring and the maintenance of all inside wiring became effective on January 1, 1987.[41] The Commission had previously detariffed the installation of complex inside wiring.[42] As a consequence of those detariffing actions, LECs must exclude all inside wiring costs incurred after January 1, 1987, from their interstate access revenue requirements.[43]

52. The *Joint Cost Order*[44] established a costing system for LECs to follow to ensure that their access filings do not include inside wiring or other nonregulated costs. Under this system, Tier 1 LECs must prepare, and obtain Bureau approval of, cost allocation manuals that separate regulated costs from nonregulated costs on a cost causative basis.[45] The manuals set forth the procedures the LECs employ to divide the accounts listed in the Commission's Uniform System of Accounts (USOA) into homogeneous cost categories or pools. The pools, in turn, are either directly assigned to or allocated between regulated and nonregulated activities in accordance with cost causality. The LECs must retain a complete audit trail of their apportionments and make that information, as well as all related data and workpapers, available to the Commission.[46]

53. The LECs filed their cost manuals between July and September 1987. We conditionally approved each of those manuals after extensive review.[47] In performing this review, we did not attempt to evaluate the LECs' internal data collection and recording procedures. We stated, however, that we would audit those internal procedures and disallow for ratemaking purposes any costs that the LECs improperly classify as regulated costs.[48]

54. The LECs' 1989 access tariff filings are based on the cost manuals that were on file as of June 30, 1988. Since that time, we have ordered the LECs to make substantial revisions in their manuals to ensure that the LECs apportion all their costs in accordance with cost causality. Those revisions should affect apportionment results for both the direct costs of the LECs' wiring operations[49] and the overheads associated with those operations.[50]

b. Petitions

55. MCI contends that some LECs have not properly proposed increases in expenses allocated to inside wire. MCI submits that a deregulated service cannot cause interstate expenses to increase, and questions whether these LECs have shifted the expenses which were eliminated from inside wire to another regulated account. MCI therefore contends that the Commission should disallow any increases in Account 6362 expenses and should require carriers that have not assigned any non-regulated expenses to Account 6362 to revise their annual filings.[51] Similarly, US Sprint contends that Ameritech (Michigan), New England Telephone (Massachusetts), Nevada, US West (Northwestern Bell), and Southwestern forecast increases in expenses for inside wire in 1989. According to US Sprint, these expenses should be investment-related, and therefore should not rise as investment declines. US Sprint requests that the carriers be required to explain why inside wire expenses did not decrease.[52]

c. Replies

56. Those LECs that propose inside wire increases maintain that their projections are reasonable. Ameritech takes issue with MCI's claim that its companies incorrectly propose increases in expenses allocated to inside wire. Ameritech argues that the companies have properly included only regulated expenses, since some regulated inside wire investment still exists in the companies' accounts. Ameritech notes that Michigan Bell maintains some regulated inside wire investment on its books because it has not yet completed the 10-year amortization plan for such expenses. While Illinois Bell has completed amortization, Ameritech contends, it transferred invest-

ment in Account 2426, building cable, which is treated as regulated for depreciation purposes, to Account 2321, customer premises wiring, pursuant to an Order released by the Illinois Commerce Commission.[53]

57. Bell Atlantic notes that the Commission has left the definition of inside wire to the states, and argues that its continuing regulated costs for inside wire are the result of the large embedded base of high-rise residential and multi-tenant business locations in its service areas.[54] BellSouth argues that the Commission has observed that "substantial amounts" of regulated expenses remain in the inside wire account.[55] Contel asserts that MCI incorrectly assumes that inside wire expenses are the only expenses chargeable to Account 6362 -- Other Terminal Equipment Expense. Contel notes that its Account 6362 expenses also include the maintenance of subscriber carrier line units, data station termination devices, and emergency 911 and handicapped customer premises equipment.[56]

58. Cincinnati asserts that its non-regulated inside wire expense is assigned to Account 6311, not Account 6362 as assumed by MCI, and that Account 6362 expense includes network terminating wire that is still regulated under Part 32 of the Commission's Rules.[57] NYNEX maintains that although the investments associated with inside wire are being phased out of the common line rate base, total company increases in marketing and corporate operations expenses, as well as increases in the Plant Specific and Plant Non-Specific accounts, contribute to its projected increase in inside wire expenses. NYNEX also notes that common line inside wire depreciation shows a slight decrease.[58]

59. Nevada argues that MCI has exaggerated the growth in allocated inside wire expenses by displaying total test year unseparated expenses in Account 6362, and submits that it has reduced its test year interstate inside wire revenue requirement.[59] SNET asserts that all expenses it has included in Account 6362 are regulated and have been properly reflected in Chart COS-7.[60] GTOC submits that it reduced its inside wire expense for California in its errata filing.[61]

60. Southwestern contends that the expenses associated with the deregulated portion of inside wire are included with the non-regulated costs and are not included with its costs subject to separations. Southwestern maintains that the Common Line -- Inside Wire column of Chart COS-1 does not identify the deregulated costs of inside wire but only identifies those costs associated with the embedded inside wire investment that are allocated to this category. Since Part 69 of the Commission's Rules uses investment as the basis for allocation and since the embedded inside wire investment is allocated to this subcategory, some of the investment-related expenses are also allocated to this subcategory.[62] Southwestern submits, however, that it will adjust its rates to correct an overstatement of embedded inside wire investment.[63]

61. US West asserts that it appropriately accounted for non-regulated inside wire expenses in Chart COS-7. It argues that instead of booking such expenses to Account 6362, it has been recording them in Account 6426 -- Intra-Building Cable & Wire, and contends that the projected non-regulated inside wire expenses were removed prior to separations.[64] In addition, US West argues, the increase in Northwestern Bell's inside wire expense reflects a new approach for determination of the IOT investment associated with private lines. US West notes that in 1988, NWB directly assigned IOT investment to interstate private line based on relative jurisdictional distribution of loops, but anticipates discontinuation of this practice in 1989. US West submits that the elimination of direct assignment of IOT investment to private lines shifts a higher proportion of IOT investment into the common line investment than was included in that category in 1988.[65]

d. Discussion

i. Field technician reporting procedures

62. We recently examined the internal accounting procedures of many of the LECs to determine whether the LEC procedures for recording wiring maintenance expenses are consistent with the Commission's requirement that regulated costs be separated from nonregulated costs on a cost causative basis.[66] As part of that examination, we directed the BOCs and GTOC to provide us with copies of the internal guidelines and instructions provided field technicians, and to answer a series of questions regarding the application of those guidelines and instructions. Our review of the companies' responses focused on the methods the BOCs and GTOC state they employ in classifying as regulated or nonregulated the travel, testing, installation, and repair time of their field technicians.

63. This study revealed that the BOCs and GTOC are systematically overstating their regulated wiring costs. While the misclassifications that cause the overstatements vary from company to company, the information submitted in response to our data requests establishes that these companies classify as regulated certain functions that field technicians perform in furtherance of the companies' nonregulated activities. That information also reveals that these companies are apportioning to regulated activities excessive portions of the costs of other functions that field technicians perform in support of both regulated and nonregulated activities.

64. Southwestern has adopted two sets of guidelines and instructions for recording travel time. The first set attempts to channel travel time associated with particular functions to Southwestern's reporting codes for those functions. The second set assigns travel between jobs that takes more than 15 minutes in an entirely different manner. The two sets leave the field technician with no clear guidance regarding Southwestern's policies on travel time.

65. Southwestern's own interpretation of its guidelines and instructions compounds this problem. According to Southwestern's responses to our questionaire, its field technicians are to use these contradictory instructions to record all testing and repair time for all customer premises visits that result in the isolation of a network, inside wiring, or CPE problem.[67]

66. Many of the systematic misclassifications relate to customer premises visits during which a field technician isolates a single problem. Such visits are in response to customer trouble reports. We believe it axiomatic that the costs of responding to any such report should be assigned to regulated activities when a network problem is isolated and to nonregulated activities when an inside wiring or CPE problem is isolated.[68] While all companies except Nevada state that they assign the costs of responding to such reports to regulated activities when a network problem is isolated, many companies, including Ohio Bell and Wisconsin Bell, assign only a portion of their trouble isolation costs to nonregulated activities when an inside

wiring or CPE problem is isolated. Similarly, when a field technician isolates a CPE problem during a customer premises visit, Pacific and Wisconsin Bell assign all the costs of that visit to regulated activities unless the technician also isolates an inside wiring problem.

67. Several companies classify the visit as nonregulated if the field technician repairs the inside wiring, but classify the visit as regulated if the customer elects not to have the field technician repair the inside wiring.[69] The rationale behind these classifications appears to be a belief that a visit must be a regulated visit when the customer obtains no maintenance services other than a determination as to the side of the demarcation point on which the trouble is located. However, it appears that each of these companies will repair the inside wiring problem if the customer agrees to pay a time and materials charge. In these circumstances the costs of the visit should be classified as nonregulated regardless of the customer's response to the company's offer. The classification of costs should not be dependent on the success of a company's efforts to sell nonregulated repair services to its customers.[70]

68. In order to respond to a customer trouble report, a field technician must drive to the customer premises and perform tests at the customer premises. Testing and travel time, like direct repair time, is caused by the problem that prompted the trouble report. When the field technician is able to isolate the problem's cause, the costs of these functions should be apportioned in accordance with that cause. Pacific, however, instructs its field technicians to classify all testing and travel time as regulated unless the cause of the trouble is known to be an inside wiring problem prior to the customer premises visit. If the field technician isolates a regulated problem, Pacific assigns all the testing and travel time to regulated activities. If the field technician isolates an inside wiring problem, Pacific divides the testing and travel time equally between regulated and nonregulated activities.[71]

69. Bell Atlantic assigns all travel time to the first activity the field technician performs at the next job. Indiana Bell assigns all travel time to the code for the majority of work time spent. Although Michigan Bell asserts that it assigns travel time in accordance with its trouble isolation results, the instructions and guidelines Michigan Bell states that it provides its field technicians contain no instructions on this subject.

70. We also uncovered systematic misclassifications in relation to customer premises visits during which a field technician isolates both regulated and nonregulated problems. Southwestern, however, states that it assigns all costs, including repair time for inside wiring, to regulated activities when its field technicians isolate both regulated and nonregulated problems during the same customer premises visit. In such circumstances, Pacific assigns disproportionate portions of its time to regulated activities. GTOC (Florida) and Illinois Bell assign all travel time to regulated activities, and BellSouth assigns all trouble isolation time to regulated activities, when both regulated and nonregulated problems are isolated.

71. Many BOCs and GTOC also systematically misclassify their wiring costs when their field technicians are unable to gain access to the customer premises (no-access" visits) or, having gained access, to isolate the cause of the trouble (no-trouble-found" visits).[72] It seems likely that the relative frequency of nonregulated problems in these visits at least equals the relative frequency of nonregulated problems in visits in which the trouble is isolated. Many LECs appear to assume that a problem must be a network problem when their field technicians are unable to gain access to a customer premises.

72. When the field technician is unable to gain access to the customer premises, Bell Atlantic, GTOC, Michigan Bell, NYNEX, South Central Bell, and US West assign all their costs to regulated activities.[73] Southern Bell follows the same practice in Florida and North Carolina. Illinois Bell, Indiana Bell, and Ohio Bell assign such costs to regulated activities unless the costs are incurred in testing inside wiring or CPE.[74] Pacific assigns all such costs to regulated activities except costs incurred in testing inside wiring from points on the customer's side of the demarcation point and 50 percent of the costs incurred in connection with problems that Pacific subsequently determines are inside wiring problems. Southwestern indicates that it apportions these costs to regulated activities unless its field technicians isolate an inside wiring problem, but its guidelines and instructions contain no information on this subject. While Wisconsin Bell now apportions such costs between regulated and nonregulated activities when it is unable to gain access to the premises, its regulated wiring expense forecasts for 1989 assume that these costs will all be assigned to regulated activities.

73. When the field technician is unable to isolate a problem after gaining access to the customer premises, Ameritech, Bell Atlantic, GTOC, and NET assign all the costs they incur to regulated activities.[75] BellSouth follows an identical practice in at least some jurisdictions, as does US West in those jurisdictions where it assigns its trouble isolation costs to regulated activities. Pacific's and Southwestern's practices when they are unable to isolate problems are identical to their practices when they are unable to gain access to the customer premises.

74. We uncovered additional systematic misclassifications in relation to the installation of standard network interface (SNI) devices. Virtually all the companies we studied follow a practice of installing these devices when field technicians visit customer premises that are not so equipped. We believe that it is improper to associate any travel, trouble isolation, and repair time with the installation activities, when the premises visit is in response to a customer trouble report and the trouble is not isolated as a network problem. As GTOC indicates, "[t]he purpose of the trip was the deregulated repair rather than the [SNI] installation, and the travel [should be] charged to the deregulated repair in these situations."[76]

75. BellSouth, however, assigns portions of its testing and repair time to regulated activities when its field technicians install SNI devices during customer premises visits in which only inside wiring or CPE problems are isolated. Wisconsin Bell and US West follow an identical practice with regard to travel time. Indiana Bell classifies as regulated all travel time associated with those customer premises visits in which the majority of the field technician's work time is devoted to SNI installation, even if an inside wiring or CPE problem caused the visit. Indiana Bell follows the same practice when its field technician isolates both regulated and nonregulated problems during the same customer premises visit. Although Southwestern states that it loads no travel time onto SNI installation activities when its field technician isolates an inside wiring or CPE problem, the guidelines and instructions it provides field technicians require such loadings.[77]

ii. Data submissions

76. We have also asked the BOCs and GTOC to provide us with data, for 1987 and for the first four months of 1988, on trouble report totals, regulated hour totals, and nonregulated hour totals for certain basic categories of customer premises visits.[78] We also requested that the BOCs and GTOC provide us with the total operational and nonoperational hours their field technicians reported during 1988 for regulated and nonregulated activities. Finally, we requested the BOCs and GTOC to categorize the totals to particular accounts and to identify the number of hours within each account recorded for the basic categories of customer premises visits we had previously identified and for certain sub-categories within those categories.

77. The trouble count data the BOCs and GTOC submitted in response to our first data request show wide variations in the relative percentages of isolated wiring problems that those companies classify as nonregulated. Those percentages range from a low of approximately 10 percent nonregulated to a high of approximately 90 percent nonregulated. The data NYNEX submitted show incredible variations. NYNEX states that only 11.7 percent of the problems NYT's field technicians isolate are nonregulated problems. For NET, the corresponding percentage is 79.5 percent.

78. The data submitted for customer premises visits in which the field technician is unable to isolate a problem also reveal unlikely variations. Those percentages vary from 0 percent to approximately 50 percent of total customer premises visits. Although we recognize that differences among the BOCs' and GTOC's practices with respect to demarcation point location may cause some variations in the relative frequency of nonregulated wiring problems and no-trouble-found reports, we find variations of the magnitude reported by the BOCs and GTOC totally implausible. Therefore, we must conclude that the trouble count data submitted by the BOCs and GTOC do not accurately represent the field technician activities of at least some companies.

79. The BOCs' and GTOC's responses to our data requests also indicate that the majority of those companies have made no systematic efforts to monitor the effect of their internal accounting procedures. No company was able to provide reliable data on the frequency with which field technician perform the various basic functions on which we requested information. Most companies were unable to provide any information other than the number of hours they record in particular accounts for customer premises visits that the companies classify as involving exclusively regulated activities, exclusively nonregulated activities, or no-access or no-trouble-found reports.

80. In view of the serious deficiencies in the current account procedures of many or most of the LECs, many forecasts that are based on the assumptions that carriers will continue to follow their current practices inevitably overstate the wiring installation and maintenance expense that can properly be attributed to interstate access revenue requirements. We have accordingly computed disallowances for such maintenance expenses that are most likely to be overstated.

iii. Disallowances

81. Given these various and substantial errors in the inside wire costs allocated to regulated activities, it appears that the best available benchmark for estimating the inside wire costs that would be allowable if properly assigned is provided by the results of the first audit of BOC implementation of an approved cost manual. This audit of BellSouth revealed substantial overallocations of regulated costs. BellSouth's present filing has corrected many of the errors revealed by this audit and as a result proposes to allocate only 40 percent of its total inside wire expenses to regulated activities, among the lowest allocations of the major carriers.

82. Moreover, while the BellSouth companies do show variations among themselves, which might be expected in view of differing local circumstances and definitions of the demarcation point, all BellSouth companies compute relatively low allocations for regulated costs. This pattern strongly suggests that differences in cost allocations are largely attributable not to local conditions but rather to errors in methodology and implementation. Overall, the audited results for BellSouth appear to set a reasonable benchmark to estimate the levels of allocations to regulated activities which have not yet been audited. Our preliminary evaluations of the manuals and their implementation by other companies further support the likelihood that the BellSouth figure will prove typical and reasonable for other companies.

83. However, even in BellSouth's case certain deficiencies still appear to overallocate regulated costs. First, BellSouth assigns to regulated activities all time for trouble isolation performed at the demarcation point, and also bases its allocation of travel time on this trouble isolation activity. This approach appears to allocate both the trouble isolation activity and travel time to regulated activities. Second, travel time allocated to regulated activities also is apparently overstated by inclusion of time spent installing standard network interface devices. Third, BellSouth assigns all no-trouble-found time to regulated activities. Finally, BellSouth's apportionment of its no-access time on the basis of time rather than trouble counts probably overallocates regulated costs, because problems associated with regulated activities probably take more time to correct. We believe that an additional 8 percent reduction in BellSouth's allocation of these costs to regulatory activities is a reasonable, conservative estimate of adjustments warranted to correct these practices.

84. Based upon the results of the BellSouth audit and our further review of its procedures, we accordingly believe that 32 percent is the best available estimate of the proper allocation of inside wire expenses to regulated activities. We also believe that this benchmark is likely to be a more accurate estimate than the clearly flawed allocations projected by the LECs. We also consider any errors in the implementation of LEC cost allocation manuals for nonregulated activities to be extremely serious and critical. Accurate implementation of these manuals is a linchpin of Commission programs both to allow flexibility for the LECs to engage in nonregulated activities and to protect ratepayers from cross-subsidization. The actual audited results of LEC implementation are, we believe, entitled to significantly greater weight than essentially unsupported forecasts.

85. Accordingly, we have computed adjustments based upon a 32 percent allocation for the BOCs and GTOC in Appendix B. In two cases, modifications of the method-

ology seemed appropriate. For US West we have added the nonregulated portion of Account 6426 that is associated with inside wire to Account 6362. For BellSouth, we have added the regulated inside wire portion of Account 6426 to Account 6362 and removed the expenses associated with nonregulated CPE installation. We also impose no disallowance against GTOC (Florida) because a corporate affiliate performs that company's nonregulated inside wire operations.

86. As is the case with other rate adjustments in this Order, the disallowance of these inside wire costs is not a rate prescription. The LECs remain free to present improved, more credible demonstrations of proper inside wire allocations.

10. Other LEC Nonregulated Expenses

87. Petitioners also object to certain nonregulated expenses by other LECs, including Rochester, Lincoln, Centel, Pacific, and Nevada. Aside from an error by Rochester in the inside wire component of its carrier common line rate, which was corrected in an errata filing, errors in Centel's data which apparently do not affect rates, and a *de minimis* error in Pacific's Account 1220 expenses, the LECs appear to have adequately addressed these issues and no specific adjustments appear warranted.

C. *Unseparated Costs*

1. TRP Analysis

a. Introduction

88. As part of the review of proposed rates, we analyzed Tier 1 LECs' projections of unseparated costs. Projections of unseparated costs consist of LECs' budget estimates (budget views) after the removal of nonregulated costs, such as certain inside wire costs, and prior to the separation of costs between the state and interstate jurisdictions. From another perspective, unseparated costs are simply the LECs' budget projections for their total regulated operations.

89. Analysis of LECs' projections of unseparated costs is important because they derive from budget views which are not governed by specific rules, such as Parts 36, 64, or 69, which specify the allocation procedures that companies must follow in calculating their access costs. LECs have wide discretion in forecasting the composition and magnitude of budget views and unseparated costs. As a result, overestimates of test year costs are most likely made at these levels.

90. This Section presents the analysis of Telephone Plant in Service (TPIS)[79] and Expense Less Depreciation (ELD), two important categories of unseparated costs which lend themselves to statistical analysis based on data provided by the LECs in the Tariff Review Plan (TRP). Other important cost categories, such as depreciation expense and taxes, are discussed in other Sections.

91. The analysis of unseparated costs is a bipartite analysis. The first part consists of trend analysis of historical unseparated TPIS and ELD.[80] This analysis is similar to the ELD analysis contained in the *1988 Access Tariff Order*. [81] The analysis identifies forecasts that are higher than the historical trend and reduces them, if warranted. The second part consists of cross section analysis of disaggregate cost categories which comprise TPIS and ELD. For 22 important cost categories,[82] the analysis compares growth rates of projected costs over historical costs among the 96 Tier 1 company study areas (COSAs).[83] The analysis identifies anomalously high projections and reduces them, if warranted. Together, these two analyses identify unreasonable projections at both an aggregate and disaggregate level of costs, thereby helping to ensure that the LECs' forecasts are reasonably accurate. Section V.C.1.g, below, describes how the disallowances produced by the two analyses are integrated into a final set of disallowances.

b. Report card tests

92. An important part of both the trend and cross-section analysis consists of "report card" tests. Report cards measure the accuracy with which LECs have forecasted TPIS and ELD in previous annual access filings.[84] Currently, there are three applicable report cards, for the July 2, 1985, filing (June 1, 1985, through May 31, 1986, test year), the October 3, 1986, filing (calendar year 1987 test year) and the October 2, 1987, filing (calendar year 1988 test year).[85] The performance of each LEC, as indicated by its report card record, is an important factor in determining the confidence we place in its test year projections. Our statements in the *April 1986 Order*,[86] and the *1988 Access Tariff Order* [87] bear repeating:

> The Bureau is engaged in an ongoing process of review of the LECs' operating statistics. Such review consists basically of two functions: forecasting and monitoring. We forecast certain test year operating statistics in order to judge the reasonableness of access rates which LECs propose and the cost support on which the rates are based. We monitor various historical operating statistics in order to evaluate retrospectively the accuracy of the LECs' (and Bureau's) forecasts. We believe that there should be a close connection between forecasting and monitoring. Forecasts made by the LECs should be subject of retrospective scrutiny so that definitive conclusions may be reached concerning their accuracy. As a result of such monitoring, both the industry and the Commission will accumulate a body of knowledge that may enable them to improve the accuracy of test year forecasting and ratemaking. Such monitoring will allow the development of a "track record" concerning the accuracy of each company's cost support material. Such a track record can be used to encourage each LEC to improve the accuracy of its forecasting and enable the Commission to focus on problem topics or companies. We believe that this kind of monitoring can play an important part in the tariff review process. A process which retrospectively evaluates LEC forecasts likely will play a key role in rationalizing and expediting the review of LECs' proposed tariffs.

93. Two report card tests have been devised for use in the 1989 annual access tariff review. The first is for TPIS and the second is for ELD. The tests are constructed identically. LECs' forecasts for the 1985-86 test year are compared to the actuals for that year and the percentage difference between the forecasts and actuals are calculated. The results comprise the 1985-86 report card. Similarly, forecasts for the 1987 and 1988 test years are compared to actuals and the percentage differences are calculated. These comprise the 1986 and 1987 report cards, respectively. We develop a report card test consisting of a

weighted combination of the 1985-86 report card, the 1987 report card, and the 1988 report card. Less emphasis should be placed, however, on the accuracy of earlier forecasts and more emphasis on the accuracy of more recent forecasts. Hence we assign lesser numerical weights to earlier report cards than to later report cards. A weight of 1 is assigned to the 1985-86 report card and a weight of 2 is assigned to the 1987 report card.

94. If full calendar year data existed for the 1988 actuals, a weight of 3 would be appropriate for the 1988 report card. Since, however, only partial data are available for calendar year 1988, it is appropriate to place less confidence in the results of the 1988 report card by assigning it a weight of 2. Using these weights, a weighted average of the three report cards is developed for TPIS and ELD, respectively, and designated as report card tests for TPIS and ELD. The report card tests display the overall accuracy of the LECs' forecasts during the last three test years.[88] To the extent that LECs have overforecasted TPIS or ELD by more than 1 percent on average during the last three test years, the LECs receive a failing grade for TPIS or ELD, respectively.[89] The results of the report card tests for TPIS and ELD are displayed in Appendix C, Workpapers C-1 and C-2, respectively.

95. In accordance with the reasoning contained in our statements in the *April 1986 Order* and the *1988 Annual Access Tariff Order*, LECs that have poor report cards are subject to more stringent conditions both in determining whether their forecasts should be reduced and in the severity of the reduction.

c. Trend analysis

96. Regardless of whether companies have passed or failed the report card test, evaluation procedures for revenue requirement projections rates are more stringent than the evaluation procedures used in the *1988 Annual Access Tariff Order*. In that Order, LECs' forecasts for ELD were reduced only if the LEC failed the report card test. Such forecasts were reduced to the outer bound of a 95 percent confidence interval surrounding the trend line. If a LEC passed the report card test, its forecast was not reduced even if it was extremely anomalous, *i. e.*, outside a 95 percent confidence interval. In other words, both selection of forecasts requiring reduction and the level of the reductions imposed represented lenient evaluation procedures.

97. We have adopted more stringent evaluation procedures this year for three reasons. First, consideration of the balance of interests between access service providers and end users of access service leads us to the conclusion that the former leniency in evaluation procedures is inequitable. Recent experience has shown us that carriers often are not forthcoming in proposing midcourse corrections to lower unreasonably high rates.[90] Delay in filing appropriately reduced rates results in significant costs to end users of access service.

98. More stringent evaluation criteria are also appropriate because the Commission has accumulated important experience in judging the reasonableness of LECs' forecasts of costs. Prior to the 1988 annual access tariff proceeding, the Commission's experience in evaluating test year forecasts by means of statistical analysis was related primarily to test year demand. In the 1988 annual access tariff filing, the Commission statistically evaluated ELD forecasts for the first time. As a result of that experience, the Commission has laid the groundwork for more rigorous use of the results of statistical analysis of cost data in reviewing carrier submissions.

99. The Commission also currently possesses improved cost data for use in statistical analysis. Time series data now exist from the third quarter of 1984 through the third quarter of 1988, a period of four years. The time series data contain enough observations to develop a more reliable trend estimate than previously. For example, in trending ELD historical data, it is possible to improve the statistical analysis by modelling seasonal variations by quarter. In addition, as will be explained in the discussion of cross-section analysis, below, the Commission now has at its disposal substantially more disaggregate cost data than previously. Disaggregate cost data improve the ability with which the Commission can statistically evaluate forecasts of costs for the test year.[91]

100. For the TPIS trend analysis, we have adopted the following evaluation procedures. For companies which pass the report card test for TPIS, forecasts greater than the forecast mean plus one standard deviation are reduced to the forecast mean plus one standard deviation.[92] For companies which fail the report card test, forecasts greater than the forecast mean are reduced to the mean. The results of the trend analysis for TPIS are displayed in Appendix C, Workpaper C-3.

101. Adoption of these evaluation procedures for TPIS forecasts will ensure that companies with good report cards have sufficient flexibility to forecast aggregate telephone plant and at the same time guard against their departing unreasonably from historical trends. On the other hand, for companies which have failed the report card test for TPIS, forecasts above the historical trend will not be allowed absent a persuasive explanation. In our judgment, forecasts derived from the historical trend are likely to be most accurate for companies which fail the report card test.

102. As a general matter, we believe that it is appropriate to apply the same procedures for evaluating and adjusting forecasts of ELD as are for evaluating and adjusting forecasts of TPIS. However, problems in the ELD time series data preclude us from doing so at this time. The time series data for ELD are, in general, more volatile than data for TPIS. Compounding this characteristic of ELD data, is the discontinuity in ELD costs that characterizes the implementation of Part 32 rules on January 1, 1988.[93] Although the linear trend model that we have developed for ELD accounts for the discontinuity in a statistically correct manner, only three quarters of data exist subsequent to the implementation of Part 32. The paucity of post-implementation data makes it difficult to judge the likely accuracy of a forecast based on the trend mean of quarterly cost data from third quarter 1984 through third quarter 1988. Therefore, we have been cautious in using ELD trend results to evaluate the reasonableness of the LECs' ELD forecasts.

103. In our judgment, reduction of forecasts below the mean plus one standard deviation would significantly risk lowering forecasts below the likely 1989 test year actuals. Regardless of report card results, therefore, no LEC's forecast is reduced below the mean plus the first standard deviation, as a result of the reductions developed from ELD trend analysis. The forecasts of companies which pass the report card test for ELD and the forecasts of companies which fail the test will be identically reduced

to the mean plus one standard deviation of forecasts if the forecasts exceed the mean plus one standard deviation, based on their respective historical trends.[94]

104. In effect, we are using the same standards for identifying and reducing unreasonably high ELD forecasts for companies which pass the ELD report card test as we used for identifying and reducing unreasonably high TPIS forecasts for companies which passed the TPIS test. For companies which fail the ELD test, however, we are adding a needed measure of leniency in comparison to the procedures adopted in the TPIS trend analysis. The results of the trend analysis for ELD are displayed in Appendix C, Workpaper C-4.

d. Cross section analysis

i. Introduction

105. In addition to trend analysis of the Tier 1 LECs' aggregate TPIS and ELD projections, we performed cross section analysis of specific important unseparated cost categories that comprise TPIS and ELD. Chart COS-8 of the *1989 TRP*, as reflected in the Chart COS-8 database,[95] provided the data used in the analysis.

106. Chart COS-8 shows unseparated historical costs and test year cost projections for detailed plant and expense categories. A cross section statistical analysis of 22 cost categories has been used to identify cost category forecasts that are anomalously high, given industry-wide experience. In these cases, the carrier has the obligation to show that some unique circumstance justifies the forecast increase. In the absence of such a showing, the Bureau has substituted a forecast based on industry-wide expectations. This approach complements the trend analysis, described above, which uses each operating company's historical growth rate to evaluate the reasonableness of aggregate plant and expense projections. Section V.C.1.e, *infra*, describes how the two sets of disallowances have been integrated.

107. Each LEC operates in a unique market, and is organized to meet the needs of its market. This fact makes it difficult to judge the reasonableness of costs using simple rules of thumb. Switch maintenance costs, for example, will vary according to the number of access lines served, the amount of traffic carried, the age and type switches employed, accounting treatments of some types of costs, labor force characteristics, and the growth in demand. Accordingly, we have not attempted to judge projected cost levels using simple ratios of cost per access line or expense per plant dollar. While such an approach may prove feasible, we do not currently possess adequate information to support such analyses.

108. While each Tier 1 LEC's situation is unique, all are subject to similar changes in market conditions. Inflation rates may vary from region to region for periods of time, but equipment and labor costs follow similar patterns across the country. Virtually all LECs face relatively steady growth in demand, with the largest swings coincident with changes in the overall economy. All Tier 1 LECs have been subject to bypass, and all have had to educate employees and customers about the rapidly changing telecommunications environment. All of these LECs have large capital budgets and stable customer bases, allowing them to gradually introduce technological improvement into their networks. Compared with most industries, LECs operate in a stable environment. These factors indicate that LECs should anticipate similar, although by no means identical, changes in costs.

109. The analysis shown in Appendix C, Workpaper C-5, confirms that LECs anticipate similar changes for the different types of cost. Standard statistical tests were used to compare the mean changes for the 22 cost categories used in the cross section analysis. These tests shows that means for individual cost categories generally were significantly different at a 95 percent confidence level from the means of other cost categories. This shows that the mean projection for a cost category is more related to factors associated with that cost category generally than to overall cost trends. Thus, it is reasonable to compare individual cost category projections with industry mean projected changes in order to judge the reasonableness of the individual projection.

110. The Bureau has used two statistical tests to identify anomalously high cost category forecasts in the Chart COS-8 data. The first test compares the projected percentage change in a cost element with the industry-wide projected percentage change. The second test compares the absolute level of change, relative to the size of the company, with the average absolute change. Minutes of use (MOUs) and access lines were used as indicators of the relative size of a company's operations in a study area. A forecast was considered to be reasonable unless both tests indicated that it was anomalously high. For each of the two tests, forecasts for a particular cost category were were deemed anomalously high if they exceeded the industry mean plus one standard deviation.

111. Before adopting this standard, the Bureau determined that companies in fast growing market areas would not be prejudiced by comparison to the industry mean. We tested statistically the correlation between growth in demand, as represented by access line growth from 1984 to 1988, and growth in costs, as respresented by unseparated ELD for the same time period. We found little correlation. We also observed that adoption of the mean plus one standard deviation as the standard for identifying anomalous forecasts provided companies a margin of flexibility that could accomodate even those companies undergoing rapid growth in costs. As displayed in Workpaper C-6, the mean plus one standard deviation represents a rate of projected growth which is very high and almost certainly sufficient for even a fast growing company. Also,the industry mean itself is probably overstated for most cost categories, as indicated by the total industry reductions derived from the trend analysis, above.

112. Absent adequate explanation of the anomalous level, anomalously high forecasts were reduced to the industry mean for study areas associated with operating companies that failed the relevant report card test (*i. e.*, the TPIS or ELD test, described above). In study areas associated with operating companies that passed the relevant report card test, anomalously high forecasts were reduced to the industry mean plus one standard deviation, absent adequate explanation of the anomalous change. As descibed below, errors or omitted data in the Chart COS-8 database also resulted in a failing report card test for certain study areas. The following section provides a detailed description of the methods employed to identify abnormally high forecasts, and to calculate disallowance levels.

ii. Methodology

113. Tier 1 carriers provided Chart COS-8 data for 96 study areas, as described in the Tariff Review Plan.[96] The Chart COS-8 format contains 242 cost categories. These cost categories correspond to major separations cost categories, and exclude costs associated with nonregulated services. Total unseparated costs are provided for each cost category by study area. The totals are provided for the PYCOS historical period in Chart COS-8(H), and for the test period in Chart COS-8(P). The total unseparated figures are disaggregated into state and interstate totals. The interstate totals are disaggregated into Common Line (CL), Switched Traffic Sensitive (TS) and Special Access (SP) and non-access categories.

114. Twenty-two of the Chart COS-8 cost categories were selected for statistical analysis. Some categories were excluded because the categories represented totals of, or detail of, categories that were selected. Some categories were excluded because they contain relatively insignificant amounts, because the pattern of historical and projected changes suggest that cross section comparisons might not be reliable, or because the data appeared to be unreliable.[97] The 22 cost categories selected are not duplicative, and comprise the most important cost categories of TPIS and ELD.

115. Two cross section tests were performed on the data in the Chart COS-8 database. In the first test, projected percentage changes were calculated for each cost element for each study area. The historical cost category data, and the projected percentage changes, are shown in Appendix C, Workpaper C-6. Means and standard errors were calculated for each of the 22 cost categories using valid data from all of the Tier 1 LECs' study areas. Appendix C, Workpaper C-5, explains the calculation of weighted means and standard errors. Appendix C, Workpaper C-6, contains the means and standard error percent changes for each of the 22 cost categories.

116. The Bureau concluded that forecasts of percentage increases that exceed the weighted mean by more than one standard deviation were likely to be unreliable. If a company's previous forecasts have been accurate, and if that carrier provided reliable data in the Chart COS-8 database, anomalously high projections were tentatively reduced to the industry mean percentage change plus one standard deviation. If a company's previous forecasts have been overstated, or if that carrier provided unreliable data in the Chart COS-8 database, anomalously high projections were tentatively reduced to the industry mean percentage change. While these carriers may expect relatively high increases for these cost categories, their failure to make good forecasts in the past detracts from their credibility now. Accordingly, anomalously high percentage forecasts were tentatively reduced to the industry mean for all study areas of operating companies that failed the relevant report card test. These tentatively reduced forecasts are, in our judgment, the largest increases that can be accepted in the absence of a compelling explanation. Reduction of anomalously high forecasts to the mean for companies with failing report cards is also intended to provide carriers with strong incentives to limit future forecasts to reasonable levels. The tentative disallowances that were determined by the first test are displayed in Chart C-7 as gross disallowances.

117. Several companies provided erroneous data on the Chart COS-8 database for categories used in the cross section analysis.[98] In some cases anomalous information was explainable, but considered unusable for cross section analysis. Both types of data were excluded from the cross sectional analysis, and are represented by the symbols "-FCC" or "ERR" in Worksheet C-6. The Bureau can place little confidence in the forecasts of those companies that provided clearly erroneous data. Accordingly, anomalously high forecasts were tentatively reduced to industry mean forecasts for study areas where one or more erroneous data elements had been provided, and not corrected on the record. The data errors are described in Appendix C, Workpaper C-8.

118. We used a second test to screen the tentative disallowances displayed in Chart C-7. If the forecast was not anomalously high according to the second test, the tentative disallowance was expunged. In other words, forecasts had to be found anomalously high by both the first and second tests in order for a final disallowance to be considered.

119. The second test determined whether the absolute amount of increase, relative to the size of the company, exceeded the weighted mean by more than one standard deviation. This test ensured that a carrier would not be penalized because it had relatively low historical cost levels for a particular cost category. Minutes of use (MOUs) and access lines were used as indicators of the relative size of the carrier's operations in a study area. Projected changes for each cost category were used to calculate projected change in cost per million MOU, and cost per access line, for each category. These data are shown in Appendix C, Workpaper C-9. Appendix C, Workpaper C-5, explains how weighted mean and standard error changes were calculated for cost per million MOU, and cost per access line. These statistics are displayed in Appendix C, Workpaper C-9.

120. Some cost categories are more closely related to MOU. In these cases, we evaluated the reasonableness of a projection by determining whether projected change in cost per MOU exceeded the mean change in cost per MOU plus one standard error for the cost category. Some cost categories are more closely related to access lines. In these cases, the reasonableness of projections was evaluated by determining whether the projected change in cost per line exceeded the mean cost per line plus one standard error. We used both tests for cost categories that were related to both MOUs and access lines. Appendix C, Workpaper C-10, shows the standard used for each cost category.

121. If the forecast that was tentatively reduced by the first test was also found anomalously high by the second test, the tentative reduction became a final one, absent sufficient justication by the company. These reductions are displayed in Appendix C, Workpaper C-7 as final reductions. The two tests identified several cost projections that were anomalously high, both in terms of percentage change, and absolute change.

122. Cross section analysis will not provide a scientific proof that a particular forecast in erroneously high. Rather, the analysis represents a practical tool that evenhandedly identifies forecasts that anomalously exceed industry wide expectations, and provides a technique for calculating more reasonable, alternative forecasts. The cross section analysis uses less historical information than does the trend analysis, and places greater emphasis on industry wide calculations. In addition, the technique is relatively new. Accordingly, we have fashioned a somewhat conservative approach. For example, we used in-

dustry-wide mean changes even though these means reflect growth trends that have been found to be unreasonably high by trend analysis. In addition, we have used two screens to test for projections that are anomalously high, and only challenge forecasts that fail both tests. Furthermore, the tests accept forecasts that are within one standard error of the mean. This threshold allows high projected increases for many of the cost categories. Finally, if LECs have good report cards for forecasts and data quality, anomalously high forecasts are reduced to the threshold level, rather than to the mean. The construction of the cross section tests, and the calculations of disallowances, represents the reasoned exercise of regulatory judgment.

e. Interstate Access Disallowances

123. The preceding discussion describes the calculation of disallowances for unseparated cost projections by use of trend and cross section analysis. For both analyses, unseparated disallowances were translated into interstate access disallowances for the common line (CL) category, the switched traffic sensitive (TS) category and the special access (SP) category. For the trend analysis, Chart COS-1(P) data were used to develop ratios of TPIS and ELD for allocating unseparated costs to the CL, TS and SP access categories. For TPIS, interstate access disallowances were calculated using the authorized rate of return of 12.00 percent and a federal income tax adjustment factor of 0.515152. The results are summarized in Appendix C, Workpapers C-3 and C-4.

124. For cross section analysis, Chart COS-8(P) data were used to develop ratios for allocating unseparated cost category dissallowances among the CL, TS and SP categories. After allocation to access categories, the revenue requirement impact of the disallowed amount was computed by summing all ELD disallowances by study area and by summing calculations of the return and tax components[99] for all TPIS disallowances by study area. The results are summarized in Appendix C, Workpaper C-11.

125. The trend analysis and the cross section analysis produce similar results in some cases. Study areas in which aggregate projections are unreasonably high are likely to have disaggregate projections that also exceed reasonable limits. Accordingly, the two sets of reductions in revenue requirements were merged to avoid duplication. In study areas where both the trend and cross sectional analyses reduced revenue requirements, the lower reduction was ignored. The final revenue requirement reductions for the three access categories are shown in Appendix C, Workpaper C-12.

f. Analysis presented by petitioners

126. The trend and cross section analyses described above are similar to arguments presented by many of the petitions to reject, suspend or investigate access tariffs. This section presents and evaluates the relevant arguments and discusses the similarities and differences between the arguments and the TRP analysis.

127. Ad Hoc suggests that NYT, US West and GTOC project increases in Category 4 central office equipment (COE) entirely out of proportion with changes in total interstate revenue requirement.[100] AT&T states that Ameritech, Bell Atlantic, GTOC, NYNEX, US West and BellSouth project growth in COE that far exceeds historical growth rates.[101] MCI alleges that Bell Atlantic predicts huge increases in Category 2 Cable and Wire Facilities (CWF).[102] Our trend analysis evaluates projected growth in aggregate TPIS, of which Category 4 COE and Category 2 CWF are an important part. Our cross section analysis evaluates projected growth in Category 4 COE for subscriber line, exchange trunk and interexchange trunk. Our analysis identifies unreasonably high growth projections for these cost categories for some of the LECs identified by MCI and AT&T.

128. MCI argues that some carriers show increases in the expenses of maintaining electromechanical COE, while overall electromechanical investment is decreasing.[103] As noted above, it is difficult to link cost categories using mechanical rules. The fact that investment in electromechanical switches is declining does not mean that the amount of equipment in place will decrease significantly. As Southwestern notes, this may simply indicate that existing equipment is growing older, more fully depreciated, and more difficult to maintain.[104] Similarly, MCI argues that the ratio of maintenance expense to investment should be less for digital equipment than for electromechanical.[105] This may be true for similar vintage equipment serving similar demand. MCI's analysis assumes away differences in vintage, implementation, and organization that may explain the statistics it calculates. Bell Atlantic replies that its allocations of analog and digital maintenance expense do not bear directly on ratemaking, and that its overall expenses are reasonable.[106] We have analyzed each carriers' projected COE maintenance expense (*i. e.*, COE plant specific expense) in the cross section analysis.

129. MCI states that NYNEX, Cincinnati, Rochester, Southwestern, and Ameritech project large percentage increases in various categories of Corporate Operations, Executive, and Planning expense.[107] The cross section analysis finds that, in most study areas, the projected increases for these carriers do not significantly exceed industry-wide average projections. To the extent that these projections contribute to an unreasonable forecast of ELD, they have been reduced as a result of the trend analysis of ELD.

130. US Sprint alleges that Bell Atlantic, Ameritech, and NYNEX show increases in total company plant non specific expenses of over 13 percent.[108] Similarly, US Sprint claims that Bell Atlantic and BellSouth have excessive increases in plant specific expenses, and that these companies, along with Nevada, have excessive increases in customer operations service expenses.[109] The cross section analysis has addressed these types of expenses on a somewhat more disaggregated level that US Sprint's analysis. This analysis revealed that these carriers had anomalously high rates of increase in these types of expenses in several study areas.

131. MCI argues that BellSouth, Bell Atlantic, and NET project excessive increases in marketing expenses.[110] AT&T similarly identifies NYNEX, and some study areas of Contel, GTOC, and United.[111] AT&T's analysis is similar to our own, comparing the percent increase of marketing expenses for identified study areas with the average percent increase in other study areas. The cross section analysis identified anomalously high projections for Bell Atlantic, BellSouth, Contel, and GTOC study areas.

g. Cost support information provided by the LECs

132. The LECs offer explanations for cost increases in their initial filings and in their reply comments. This information addresses industry-wide increases in particular cost categories and cost category changes for particular study areas. This section analyzes the LEC support information with reference to the TRP analysis.

133. Several LECs note that the historical cost data exclude the fourth quarter of 1988, and that percentage increases would be lower if those costs had been considered. For example, BellSouth identifies settlement costs that only appeared in the fourth quarter.[112] Bell South also states that 30 percent of advertising costs occur in the fourth quarter. Rochester notes fourth quarter increases in information management expenses.[113] Bell Atlantic states that it began expensing right-to-use fees in the fourth quarter of 1988.[114] Ameritech,[115] BellSouth,[116] GTOC,[117] Nevada,[118] Pacific,[119] and NYNEX[120] note that marketing expenses were relatively high in the fourth quarter of 1988. NYNEX states that projected switching investment reflects plant added in the fourth quarter of 1988.[121]

134. The TRP analysis deals adequately with these timing issues. The trend analysis includes seasonality factors for ELD, normalizes the six month gap between PYCOS and test year costs, and normalizes the nine month projections for 1989 into a test year forecast. The cross section analysis is not significantly affected by timing gaps since it does not employ time dependent analysis.

135. Several LECs provide information linking cost pressures in the economy to specific cost categories. BellSouth states that the existing labor union contract is scheduled to expire during 1989.[122] Its 1989 projections also allow for increases in retiree benefits.[123] Cincinnati noted wage increases that take effect in August, implementation of new employee benefit plans, as well as general inflation.[124] NYNEX stresses increased benefits for retired employees as well as benefits and nonwage costs.[125] Bell Atlantic relates growth in total company plant nonspecific expenses to increases in wages and rapidly increasing benefits.[126] Ameritech states that inflation accounts for much of their projected increase in expense,[127] and cites above average increases in medical and benefit expenses.[128] Rochester notes general salary increases, increased right-to-use fees for 5ESS software, and rent increases.[129] Southwestern associates most expense increases with general inflation.[130] These comments illustrate how all carriers are affected by general inflation.

136. The trend analysis did not use an explicit inflation variable. Inflation has been relatively constant over the analysis period, and thus is subsumed in the general trend. No LEC provided sufficient information to indicate that state-to-state variations in inflation uniquely justify unusually high increases in broad cost levels as measured in the trend analysis, or for specific cost categories, as measured in the cross section analysis.

137. Several LECs claim accounting changes result in low historical levels of cost, or have been factored into relatively high projected levels of cost. Bell South notes an accounting error that distorted external relations costs, and also states that accounting changes will affect its future information management costs.[131] Ameritech states that some expense increase in Michigan results from expensing independent company settlements which formerly were treated as a reduction in revenues.[132] Ameritech identifies a change in which expenses booked to plant specific accounts will be booked to corporate operations in 1989.[133] It also notes an increase in the expensing limit for furniture and equipment. Bell Atlantic notes that it began expensing right to use fees in the fourth quarter of 1988.[134] United notes that a reclassification of expenses from commercial to marketing caused the latter to show a relatively large increase.[135] NYNEX maintains that the growth rate in executive and planning expenses is overstated by a comparison of projected 1989 to actual 1988 results, because the latter figure is understated as a result of an under-accrual in 1987.[136]

138. Contel states that its marketing expense projections in California and Texas appear to be high because certain expenses that were booked to corporate operations and network administration in the historical period will be booked to marketing in the test period.[137]

139. The trend analysis was performed at an aggregate level and the cross section analysis evaluated cost categories that were on a fairly aggregate level. Because accounting changes are often at a disaggregate level, many differences due to accounting changes will not bias the results of the analysis. The trend analysis also included an explanatory variable for the important USOA changes implemented in 1988. In addition, LECs frequently implement similar accounting changes in response to regulatory or tax changes, or changes in generally accepted accounting principles. Since these changes are embodied in the industry-wide mean employed in the cross section analysis, the changes are not likely to cause companies' forecasts to be erroneously identified as anomalous.

140. Except in regard to Michigan Bell's claim concerning settlement expenses, discussed below, individual LECs have not provided adequate information to demonstrate that accounting changes uniquely affect their projections, and justify above trend increases, or account for projections that anomalously exceed industry averages.

141. We have carefully analyzed Michigan Bell's claim concerning the effect of changes in the treatment of settlements on its forecast and found it to be valid. The change is only one of the many changes wrought by the implementation of Part 32. However, unlike most USOA changes, which did not lend themselves to individual normalization, it was possible to individually normalize changes in the treatment of settlements. As a result, we have adjusted the historical and forecast ELD data used in the trend analysis to remove the effects of the change in treatment of settlements, for Michigan Bell and for other companies. *See* Appendix C, Workpaper C-4.

142. Several carriers claim some cost increases are attributable to modernization and growth. For example, Bell Atlantic cites increasing COE costs as a result of modernization, as a result of fiber deployment, and to implement a Digital Facility Management System.[138] Rochester describes the overhaul of corporate information systems, and promotion of new services made possible by the installation of new digital equipment.[139] Cincinnati cites cost increases due to technological advances and the expanding number of new services.[140] Land and building costs have increased because more office space is needed as a consequence of growth. US West cites increased training and testing as it converts to digital switching.[141]

143. NYNEX states that increased COE investment is needed to replace crossbar and electronic equipment, to provide new customer calling features and switch digital signals, and to improve quality.[142] NYNEX also notes that increased expenses occur in the early years of digital

cutover, and also cites improvements in service quality and competitiveness as a source of increased expense.[143] Southwestern cites the high initial training and right-to-use fees associated with digital cutover,[144] and anticipates a new advertising campaign.[145] Pacific states that short-term higher maintenance costs are typical for newly introduced technology.[146] Nevada projects COE investment increases due to office conversions.[147] Nevada also has higher digital expense because new switches are in high growth areas that entail substantial service rearrangements and changes. Ameritech identifies rehabilitation and replacement of aging sections of the company's distribution facilities, and updating the aging motor vehicle fleet with leased vehicles.[148] Ameritech also cites the conversion to a new directory information system as a source of increased customer operations services expense.[149] Contel states that it is converting to one-party service in Texas.[150] GTOC links its growth in COE to demand growth and modernization.[151] BellSouth is continuing to deploy digital switching to meet growth because it will reduce operational and maintenance expenses in the long term, and because it provides the flexibility to provide a wide array of services.[152] Bell South has increased the number of personnel in customer operations services to improve business office accessibility. BellSouth notes that Southern Bell is completing the mechanization of the plant location record managment systems, and therefore is anticipating lower cost increases than South Central Bell, which is still implementing such systems.[153]

144. The preceding examples illustrate that all LECs pursue modernization and growth. The trend analysis implicitly includes growth and modernization in the underlying trend line. The cross section analysis is based on averages that include industry-wide growth and modernization. No individual LEC has provided sufficient information to demonstrate that it faces a unique situation compelling cost increases that greatly exceed its own trend, or industry wide averages.

145. NYNEX states that it does not budget expenses at the level of accounting utilized by MCI in its analysis.[154] NYNEX used projections made at the Class B level of accounts and historical ratios to develop prospective costs at the class A account level. Other carriers have noted the difficulty in disaggregating forecasts to the COS-8 level. US West states that sound budgeting theory and practice leads to budgeting at the summary level of account, and that disaggregations may be imprecise.[155] In general, the cross section analysis evaluates cost projections at a Class B account level and thus avoids the problems described by NYNEX. We caution the LECs, however, that although they are free to budget at various levels, their forecasts must be valid at the level of detail contained in Charts COS-6, COS-7 and COS-8 in the TRP.[156] Assertions that PYCOS and test year costs are not comparable at the level of detail required by Charts COS-6, COS-7 and COS-8 do not constitute an adequate justification for forecasts that are anomalous at the level of detail required by these charts.

146. The preceding discussion shows that much of the information submitted by the LECs illustrates commonalities. Except in the instance of changes in the treatment of settlements, no LEC has provided sufficient information to justify overall cost increases that significantly exceed trend, or anomalous increases in detailed cost categories.

2. Levels of Depreciation Expense

a. Petitions

147. AT&T argues that the LECs have overstated interstate depreciation expense by $120 million, based on faulty assumptions regarding represcription rates and mathematical errors.[157] AT&T says this $120 million overstatement of depreciation expense results in overstating the carrier common line revenue requirement by $44 million, the traffic sensitive (TS) switched revenue requirement by $55 million, and the special access revenue requirement by $20 million.[158] NYT has overstated by $78 million its interstate depreciation expense, Bell Atlantic (Pennsylvania) has overstated by $25 million its interstate depreciation expense, and Southwestern has overstated by $17 million its interstate depreciation expense. AT&T discovered this by comparing test period depreciation rates with PYCOS data for NYT. NYT's interstate rate went from 8.4 percent to 9.7 percent. According to AT&T, NYT explains that it is currently negotiating this rate with the Commission. AT&T contends that an increase of $78 million, or 15 percent, is unlikely. The Commission has granted average depreciation rate increases of less than 5 percent, and overall depreciation rates have decreased 1 percent, not increased. [159]

148. AT&T estimates the overstatement made by Bell Atlantic (Pennsylvania) by comparing test period total company depreciation expense and test period total company depreciation expense based on the last known actual depreciation rate. Bell Atlantic (Pennsylvania) claims its rate will be represcribed in the Commission's triennial review process. AT&T does not believe that Bell Atlantic (Pennsylvania) will get the 18 percent increase it estimates. AT&T compared Southwestern's claimed depreciation expense to its telephone plant in service multiplied by the appropriate depreciation rates and found an overstatement of $67 million, or $17 million interstate, that AT&T states should be disallowed.[160]

149. MCI claims that Bell Atlantic (Pennsylvania) has overstated depreciation expense by $103 million for the total company because of speculative depreciation rates. MCI further states that NYT proposes $78 million in excessive interstate depreciation expense for the same reason. Southwestern allegedly proposes $67 million in excess depreciation expense due to an unknown problem in its expense development. MCI contends that speculative depreciation increases should not be permissible.[161]

150. After the LECs filed errata to their initial data, MCI withdrew its objection to the depreciation expenses proposed by Southwestern. MCI also notes that NYT had received interim authority for certain depreciation changes, but MCI disagrees with the decision to grant that interim authority, and asks that the Commission investigate NYT's accounting practices.[162]

b. Replies

151. NYNEX replies that Commission staff has recently informed NYT that its interstate depreciation expense for 1989 would be increased by $58.798 million. NYNEX states that an interim pooling letter will be issued by the Commission. NYT contends that it incorporated the new interstate depreciation expense in its errata filing of January 31, 1989, and reduced its 1989 access rates by $26.4 million in connection with this adjustment.[163]

152. Bell Atlantic (Pennsylvania) replies that it based its depreciation forecast on its pending depreciation represcription request. It states that a meeting to discuss that request was then scheduled for February 7, 1989. (The Bell Atlantic reply was filed on February 6, 1989.) Bell Atlantic agrees to revise the rates if a different depreciation prescription results.[164]

153. Southwestern admits that it overstated its depreciation expense for 1989. It will correct this overstatement to reflect a total company-wide interstate decrease in depreciation expense of $16.692 million. However, Southwestern claims that it cannot verify all of the petitioners' depreciation calculations, and thus will not make all the changes requested by AT&T and MCI. Southwestern notes, for example, that AT&T used an incorrect depreciation rate for the Circuit-Other account.[165]

c. Discussion

154. In previous annual access tariff Orders, we have described the manner in which the Commission prescribes depreciation rates, and calculates depreciation expenses, for carriers.[166] Briefly stated, the Commission prescribes individual carrier's depreciation rates based on factors unique to each carrier's operations, and the carriers then apply the rates to their plant balances to obtain the allowable annual depreciation expense. To ensure that the depreciation rates reflect current operating conditions, the Commission's procedure is to review and represcribe each year the rates of one-third of the subject carriers. Although this procedure would appear to produce a straightforward expense calculation for purposes of reviewing carriers' tariffs, (*i. e.*, simply multiply the prescribed rate times the average plant account balance), several considerations complicate the process for tariff purposes and require us to conduct an in-depth review of the carrier's depreciation expense projections. The areas which lead us to disallow certain expenses are described below. The detailed compilation of the disallowances, by carrier and jurisdiction, is contained in Appendix D.

i. Use of updated rates

155. We have under certain circumstances approved a claimed depreciation expense based on depreciation rates other than the prescribed rates. Generally we allow this procedure only if the carrier will file a study, as part of its triennial review, supporting a change in the prescribed rates. In these cases, we have analyzed the carriers' rates to determine whether it is reasonable to assume that the projected depreciation rate approximates the depreciation rate the Commission is likely to prescribe. If the rate change appears to be reasonably likely, we will accept projected depreciation expense based upon that depreciation rate for purposes of the annual filing even though the Commission has not prescribed the new rate. If the predicted change in rates appeared to be unlikely, we have disallowed the part of depreciation expense associated therewith.[167] A key consideration in our decision whether to disallow part or all of the projected depreciation expenses pending represcription is whether the carrier's current composite depreciation rate is above or below the composite depreciation rate of the carriers that were reviewed the previous year. If the carrier's current rate is below the composite, and if its study appears to support an increase, we will normally allow the carrier to use the higher rate, so long as it does not exceed the composite rate level. If the carrier's current composite rate exceeds the prior year's composite, we will not allow any increased expense pending Commission represcription.

156. AT&T and MCI challenge certain carriers' use of rates other than those that are currently prescribed.[168] AT&T challenges NYNEX's claimed depreciation expense for New York Telephone as being $78 million in excess of the expense that would result from use of currently prescribed rates. We conclude, however, that NYNEX's depreciation expense are reasonable and may be used in support of its tariff. We have completed our initial review of the depreciation study for New York Telephone and we issued, on February 3, 1989, an interim booking letter pursuant to Section 0.291(b)(1) of the Commission's Rules allowing New York Telephone to use revised (but lower than requested) rates during 1989. Under these circumstances, disallowance is not necessary because the interim rates, which New York Telephone has used for its revised revenue requirement, appear more accurately to reflect the depreciation rates that the Commission is ultimately likely to prescribe.

157. MCI also attacks the interim rate for adjunct processors accounted for in Account 2215 (No. 5 Crossbar) and the interim rate for Account 2232 (Circuit Equipment). It asserts that we must investigate these depreciation rates because the "accelerated depreciation" is not proper, our interim action will cause excessive depreciation expenses, and interstate customers will bear the cost of retiring the old plant.[169] We find that MCI's concerns do not support a disallowance. We allowed New York Telephone to amortize the adjunct processors over the short lives of the switches with which they are associated because this account is a short-lived account and the processors are part of a rapid retirement program for the switches. We shortened the projection life of the circuit equipment from 15 to 12 years based on a retirement study that showed a rapid retirement in this account. MCI's contentions that New York Telephone is "double-dipping" or otherwise is unfairly recovering depreciation expenses are vague and, in any event, appear to be unfounded. Our interim action for these accounts simply increased depreciation rates to reflect more rapid retirement schedules; it did not affect the amount of depreciation expense that New York Telephone will incur but only the timing thereof.

158. We will allow certain carriers other than New York Telephone also to recover depreciation expenses by using depreciation rates other than their prescribed rates, by applying the procedure described in Section V.C.2.c.i, *supra*. Our decision to disallow the higher rates to be used for the calculation of approved depreciation expenses herein does not mean, of course, that the above carriers will be unable to recover higher expenses when new depreciation rates are authorized. Those carriers may file for a mid-course correction in their access tariffs at the time the overall expense effect of any new rates is determined.

ii. Transcription errors

159. We are disallowing depreciation expenses that reflect the difference between the depreciation figures shown on certain carriers' DEP forms and their COS forms. The two figures should be identical. To resolve this unexplained inconsistency, we will use the lower number, as shown on the carrier's DEP form.

iii. Unauthorized amortizations

160. GTOC has claimed $94,200,000 in additional depreciation expense related to use of a two-year amortization of the interstate customer premises wiring account balance (Account 2321). We have authorized certain carriers to amortize these costs over a period less than the 10-year amortization period prescribed in Docket 79-105,[170] and GTOC has requested a shorter amortization. However, we have not given GTOC such authority. Accordingly, we disallow all the depreciation expenses associated with GTOC's pending request for a two-year amortization.

iv. Unauthorized depreciation rate

161. In the *1988 Depreciation Rates Order*,[171] the Commission declined to prescribe a new depreciation rate for the Analog Electronic Switching Account of GTOC (Florida). GTOC claimed that the projection life for this account had decreased from 11.5 years to 7.5 years, and that the depreciation rate for the account had accordingly increased substantially. The Commission reviewed GTOC's proposal, but determined that additional review of the switch replacement plan was required. Accordingly, the Commission directed the Bureau to review this matter in 1989, and ordered GTOC to maintain the current projection life pending the Bureau's review of the situation.[172] GTOC's rate herein, however, is based on the assumption that the Commission in 1989 will revise the projection life as it requested. In view of the Commission's clear direction to GTOC to maintain the projection life underlying the current rate, we are unable to accept GTOC's procedure. Accordingly, we disallow $24,161,000, which is the difference in depreciation expense produced by use of the current rather than the requested rate for the analog equipment.

v. Nonprescribed rates

162. The Commission does not prescribe depreciation rates for GTOC (California). The Commission does, however, review that company's rates (which are prescribed by the California Public Utilities Commission (CPUC) for intrastate purposes) as part of the subject tariff filing. The depreciation expense that GTOC claims herein is based on the use of rates that are higher than those prescribed by the CPUC. GTOC has not offered any reason in support of the difference. In view of the lack of support at the federal or state level for the higher rates, we will use the CPUC-prescribed rates.

vi. Other disallowances

163. The disallowances described in the preceding paragraphs are based on our analysis and partial disapproval of the carriers' depreciation rates. Our analysis of depreciation expense does not stop at this point, however. As noted above, carriers compute their depreciation expense by multiplying the rates times the account balances. Thus, a change in the account balance will also affect depreciation expense. Our analysis of the carriers' plant balances leads us to require additional disallowances. As noted in other parts of this Order, we have adjusted downward the plant balances of certain carriers for the purposes of this tariff filing. In determining the allowable depreciation expense for those carriers, we must also disallow that portion of depreciation expense associated with the disallowed plant.

3. Account 6728, Other General and Administrative Costs

a. Petition

164. MCI contends that BellSouth increased costs assigned to Account 6728 by $52,741,000 (18.7 percent). BellSouth purportedly explains this increase as due to a hypothetical allowance for "union contract settlement adjustments." MCI states that the Commission should investigate this increase.[173]

b. Reply

165. BellSouth replies that Account 6728 includes amounts for settlement expenses expected to be incurred for the test year, and is not based solely on historical trends. The existing labor union contract is scheduled to expire during 1989, and expenses associated with new agreements would not be reflected in the historical period. An increase in retiree benefit expenses is also expected in 1989, and the impact of rises in medical costs are included in this account. In addition, BellSouth states that a portion of settlement expenses was budgeted for the last quarter of 1989 only, rather than being spread throughout the entire year, causing the test period amount to appear inflated.[174]

c. Discussion

166. The Common Carrier Bureau has initiated our own analysis of total general and administrative expenses and has determined that BellSouth's level of expenses do not appear to warrant investigation, although some other carriers do forecast unusually high expenses in this category. For further data relating to this issue, see Section V.C.1, *supra*, and Appendix C.

4. Category 4 COE Investment

a. Petitions

167. MCI states that the LECs have made inaccurate forecasts of Category 4 COE, in that these forecasts do not coincide with the findings in Phase 2 of Docket 88-1.[175] MCI further explains that the Commission changed the allocator for these expenses from total terminations to end circuit terminations, and that this change should cause a shift in the allocation from the special access category to the switched local transport category. MCI examined differences in PYCOS and 1989 projections to find unreasonable growth in total company Category 4 COE, such Category 4 COE allocated to common line or local transport, or both, inconsistent increases in Category 4 COE allocated to special access and inconsistent decreases allocated to local transport.[176] Bell Atlantic, BellSouth, NET (Maine), Cincinnati, and US West (Oregon) increased this investment on a total company basis by over 10 percent. For example, MCI claims this error caused BellSouth to project $1,838 million interstate Category 4 COE investment compared to the $1,638 million found acceptable in Docket 88-1. Cincinnati projects $43.3 million, compared to the $36 million found acceptable in Docket in 88-1.

168. Four of six Bell Atlantic companies project total company increases of $272 million in this category. US West (Oregon) projects a 12 percent increase ($35 million total company) and NET (Maine) projects a 12.9 percent increase. BellSouth, Ameritech (Indiana), NET (Maine,

New Hampshire) numerous US West states, and GTOC (California) project greater than 40 percent increases in Category 4 COE investment allocated to common line (CL) or special access. BellSouth had a large total company increase, but others did not. MCI states that these results are unlikely to be due to separations changes, and thus may be errors. MCI says the carriers should justify these amounts. The change in the separations allocator to end terminations should have decreased the allocation to special access for most carriers, but Bell Atlantic (Delaware, New Jersey, Virginia), BellSouth, and GTOC (Florida) project increases exceeding 10 percent. These carriers should be ordered to explain and correct any errors. Also, Bell Atlantic (District of Columbia, Maryland, Virginia), Ameritech (Indiana), GTOC (Florida, Texas), and numerous US West states project anamolous decreases in their allocations to local transport. Despite this, Bell Atlantic, Ameritech (Indiana), and NWB all project large increases in switched access TS revenue requirements. These carriers should be required to explain these projections.[177]

169. Ad Hoc argues that NYNEX, US West, and GTOC show a negative revenue requirement impact and four other carriers show only minor revenue requirement increases as a result of the Commission's reconsideration of the requirement to count intermediate terminations in allocating Category 4.23 COE. Only NYT shows a substantial increase in revenue requirement. NYT, US West, and GTOC exhibit increases in Category 4 COE entirely out of proportion with changes in total interstate revenue requirement. NYNEX shows increases in Category 4 COE costs accounting for 50 percent of the total proposed interstate revenue requirement increase. US West and GTOC show Category 4 COE costs increasing despite decreases in total interstate revenue requirements. Further investigation is warranted, says Ad Hoc.[178]

b. Replies

170. BellSouth replies that, contrary to MCI's claim, its allocation of COE Category 4 investment to special access has decreased by approximately 4.7 percent. BellSouth explains that MCI's erroneous conclusion is based on MCI's use of Category 4 Exchange instead of Category 4.23 All Other Interexchange Circuit Equipment. Only the latter category is allocated based on end terminations, BellSouth avers. Additionally, BellSouth explains that the increase in total interstate Category 4 investment is primarily associated with the increasing utilization of digital electronic facilities in the exchange network as opposed to cable and wire facilities.[179]

171. US West replies that the $35 million increase in Oregon COE Category 4 investment is caused by two factors. First, according to US West, is the projected 5.4 percent growth in plant during 1989. This factor accounts for $22 million of the increase. The remainder of the increase is attributable to separations changes in termination counting methodology which affect the distribution on an as categorized basis to Category 4 Transmission investment when compared to 1988 levels.[180]

172. Bell Atlantic replies that the increase in interstate Category 4 COE is being driven by an increase in COE Transmission which in large part is due to growth in subscriber pair gain systems and other digital carrier equipment. Bell Atlantic states that this increase in COE Transmission is in line with recent growth ($450 million annualized for 1989 as compared to $460 million per year for the period 1985 through 1987.) The increase in Category 4 COE is almost entirely due to growth in wideband services, claims Bell Atlantic.[181]

173. NET replies to MCI's claim that Category 4 COE investment in Maine is overstated by explaining that rates in the New England region are not developed on a state by state basis. Rather the rates are developed on the basis of costs for all five states. NET states that the forecasted growth in COE Category 4 for all five states is 5.56 percent which NET argues is well within the range of reasonableness.[182]

174. GTOC replies to MCI's claim that GTOC (California) showed an increase greater than 40 percent in COE Category 4 by alleging that MCI may have made a posting error in one of its exhibits and that GTOC's TRP data show that common line increased 14.7 percent while special access decreased by 8.4 percent. In Florida GTOC states that the increase in COE Category 4 is justified by a 21.7 percent increase in Exchange Trunk Circuit Equipment which is attributable to the use of high capacity facilities by ICs. Decreases in Category 4 assigned to Local Transport in Florida are caused by termination of a lease for the Tampa 4E and the conversion of the balance of central offices to equal access in 1989, according to GTOC.[183]

175. Cincinnati Bell replies that Category 4 COE will continue to rise dramatically in its area due to growth in main stations and changes in calling patterns and quanities. Additionally, Cincinnati cites digital testing and the replacement of obsolete circuit equipment as causes for increases in Category 4 investment.[184]

c. Discussion

176. In general, Category 4 COE encompasses the Radio Systems and Circuit Equipment contained in Accounts 2230-2232. The cost of this equipment is assigned to Exchange, Interexchange, or Host/Remote Message Circuit Equipment. Each of these categories is further subdivided to reflect the use of the equipment, *i. e.*, wideband, trunk, line, *etc.* The majority of Category 4.23 (All Other Interexchange Circuit Equipment) included in this category is the cost of all interexchange circuit equipment not elsewhere assigned. The costs in this category are allocated to private line based on the cost per equivalent interexchange termination and the count of equivalent terminations. The cost of message circuits is allocated between operations based on the relative number of conversation minutes. *See* 47 C.F.R. § 36.126.

177. Our review of the petitions and the replies indicates that, for the most part, the LECs' forecasts of Category 4 COE costs are not unreasonable, except as indicated in Appendix C. To a large extent the petitioners' allegations appear to be based on a misunderstanding of our actions in other dockets. For example, the findings and conclusions in Docket 88-1 are not directly related to the reasonableness of the level of expenses and investments that the carriers forecast in 1989, except to the extent the Commission found methodological errors in the computation of 1988 revenue requirements that should have been corrected in the 1989 forecasts. However, the results of Docket 88-1 were never intended to become a ceiling on the amount that carriers could recover in their 1989 rates.

178. The Bureau has conducted our own analysis of the three major portions of Category 4 costs, *i. e.*, Category 4.12, 4.13, and 4.23. The other subcategories of Category 4 do not lend themselves to statistical analysis due to their volatility or small absolute dollar amount. Further, these other subcategories do not contain a significant relative amount of the total Category 4 investment. Our analysis finds that for several companies, disallowances as outlined in Appendix C are appropriate. Our analysis also finds the rest of the projections of Category 4 COE are not so unreasonable as to warrant disallowances and, therefore, the petitions are denied except as indicated above.

5. Excess Deferred Taxes

a. Petitions

179. MCI states that in Docket 88-1, the Commission required a revenue requirement decrease for Ameritech (Indiana, Michigan, Wisconsin) to flow through excess deferred taxes. MCI states that Ameritech does not indicate that it has corrected this year's calculation to reflect the disallowance. In Indiana and Wisconsin, the flow through amount decreases (which is a change in the incorrect direction) and in Michigan there is only a slight increase. For Michigan, the ordered disallowance was $5.5 million, while the 1989 change was only $.749 million. Ameritech should provide full support and the Commission should order adjustments. In keeping with another Docket 88-1 finding, MCI expected the BellSouth excess deferred tax amount to be roughly equal to last year. Instead, BellSouth shows a reduction of over $37 million. MCI asks that BellSouth provide full details of its calculations and correct any errors.[185]

180. MCI also claims that NET, US West, and GTOC show apparent increases in their revenue requirements, while the deferred excess taxes should have decreased their revenue requirements. MCI argues that GTOC and NET made mistakes last year. Those carriers may have calculated incorrectly again. MCI notes that Bell Atlantic, Southwestern, and Pacific show moves in the correct direction. MCI asks that NET, US West, and GTOC provide full support and demonstrate whether their 1989 revenue requirements include appropriate excess deferred tax flow throughs.[186]

181. Next, MCI states that Centel's proper amount was determined in Docket 88-1 to be $.845 million (Nevada) and $.408 (Florida). Yet, this year's amount for Nevada is only $.455 million and Florida shows an increase in revenue requirements (which is a change in the wrong direction) of $.353 million due to excess taxes. MCI requests that both demonstrate the accuracy of their revenue requirements. Finally, MCI alleges that United (Florida) has shown a revenue requirement reduction of about the same amount as the Commission found unreasonable in Docket 88-1 ($.971 million). MCI states that United may have made the same error, and says that, if so, United should correct it. Similarly, MCI claims that United (Tennessee) has reduced its revenue requirement by $.286 million while the Commission determined $.88 million to be correct in Docket 88-1. MCI says that these errors should be corrected.[187]

b. Replies

182. Ameritech states that MCI misconstrued the information in its TRP data. Ameritech shows that in comparison to actual 1988 excess deferred taxes, the 1989 forecasted excess deferred taxes served to reduce Ameritech's 1989 revenue requirements by $3.138 million in Indiana, $6.592 million in Michigan, and $2.942 million in Wisconsin.[188]

183. BellSouth states that it has found errors in the arithmetic signs and other errors in the TRP relating to excess deferred taxes, but claims that the correct amounts were reflected in interstate revenue requirements. BellSouth states that it has filed corrected TRP forms showing that total company impact of the flowback of excess deferred taxes is $36.3 million.[189] NYNEX states that the entries in its TRP data indicate a reduction in the 1989 revenue requirement due to excess deferred taxes.[190]

184. US West replies that it has shown the proper level of excess deferred taxes in absolute terms and, contrary to MCI's assertions, has correctly reflected the adjustment of excess deferred taxes. US West reduced the amount of federal income tax included in its revenue requirement by the amount of excess deferred taxes shown in the TRP. US West states that no correction or further adjustment is necessary.[191]

185. GTOC states that it viewed the TRP as requiring a statement of the amount by which GTOC's revenue requirement is decreased as a result of excess deferred taxes. As a result, GTOC supplied a positive number instead of a negative number. GTOC treated the excess deferred tax amount as an adjustment to the tax base and a direct reduction in income tax expense. Therefore, GTOC argues, no adjustment to the projected 1989 revenue requirement is necessary.[192]

186. Centel admits that there is a sign error in the revenue requirement impact for Florida. The amount of $353,000 should be a negative number, reflecting a reduction to the revenue requirement. Otherwise, Centel defends its numbers, stating that the deferred taxes in any given year are a function of the federal income tax rate that year. Because the Tax Reform Act of 1986 reduced the federal income tax rate from 46 percent to 34 percent, the deferred income tax reserve was revised downward.[193]

187. United states that the Commission's conclusion in Docket 88-1 was in error. Furthermore, United states that both Florida and Tennessee experienced amortizations of depreciation reserve deficiencies in 1988 which neither expects to recur in 1989. Therefore, United concludes, excess deferred taxes should not be roughly the same for both years.[194]

188. Rochester states that the amount shown in its TRP is not the amount of excess deferred taxes. It reflects the net impact of the Tax Reform Act of 1986 on Rochester's tax liability, which is to increase tax liability by $406,000. Rochester states that the reduction in the corporate tax rate was more than offset by the loss of various deductions and credits, particularly the investment tax credit.[195]

189. NET states that MCI is incorrect in its interpretation that NET's TRP data reflect an increase in revenue requirements. NET states that it reduced its 1989 revenue requirements due to excess deferred taxes by the amount shown in the data. Moreover, NET states that it displayed its flow through of excess deferred taxes in its workpapers.[196]

c. Discussion

190. We believe that Ameritech did not correctly report its excess deferred tax flowback on form COS-3. Ameritech reported the incremental impact of excess deferred taxes between the 1989 test year and the 1988 PYCOS period, whereas the instructions for COS-3 direct carriers to identify that portion of the FIT adjustment which was attributable to excess deferred taxes for the 1989 prospective test year.

191. Our review of Exhibit III-3 of Ameritech's reply indicates, however, that the amounts shown are consistent with the level of revenue requirement impact that one would expect to occur in 1989 based on Ameritech's filings in the 1988 tariff investigation and we believe that Ameritech's COS-3 filing should have reported the amounts. Thus, we conclude that although Ameritech's data were incorrect, we believe no further action is necessary.

192. Our review of Centel's 1989 excess deferred tax flowback data indicates that Centel has properly flowed back taxes in accordance with the Tax Reform Act of 1986. Centel has admitted that the amount for Centel (Florida) should be a negative value of $353,000 so that it is consistent with its other study area data. Moreover, using the data supplied by Centel in its reply comments, we were able to approximate the revenue requirement impact figures shown by Centel on their COS-3 forms.

193. BellSouth has admitted that its COS-3 forms were filed with inconsistent arithmetic signs and that the data for South Carolina was incorrectly stated on the TRP. Consequently, BellSouth has refiled its COS-3 forms to show a $36.3 million total company interstate impact from the flowback of excess deferred taxes. Since the $36.3 million flowback appears to be reasonable when compared to BellSouth's 1988 actual flowback estimate of $37.6 million, we believe no further action is necessary.

194. The instructions for COS-3 Column G direct carriers to identify that portion of the FIT adjustment which was attributable to excess deferred taxes for the 1989 prospective test year. Without specific instructions requiring the data in Column G to be shown as a negative value, we believe carriers can correctly report the adjustments due to excess deferred taxes on COS-3 Column G either as negative values or positive values as long as consistent treatment is applied to all study areas. A negative value, as MCI suggests, would represent the amount by which the revenue requirement in Column A was decreased as a result of excess deferred taxes. A positive value, on the other hand, would represent the amount by which the revenue requirement in Column A would have increased if excess deferred taxes had not been flowed back. The GTOCs employed the latter approach in filing a positive figure of $26.0 million on their COS-3 form. This $26.0 million dollar amount is supported by the GTOCs' Exhibit 5. We conclude that no adjustment is necessary to the projected 1989 revenue requirements of the GTOCs for excess deferred taxes.

195. US West also employed the latter COS-3 Column G approach in filing a positive figure of $28.3 million on their COS-3 form. Since US West reflected excess deferred taxes correctly in last year's tariff filing and indicates in its reply that it has reduced revenue requirements by $28.3 million as shown on COS-3, we feel that further action is unnecessary.

196. The corrected information in Docket 88-1 shows that United properly flowed back excess deferred taxes by reducing revenue requirements for Florida by $1.4 million and Tennessee by $.488 million. On its COS-3 filings for 1989 United (Florida) indicates a revenue requirement reduction due to excess deferred taxes of $.971 million and United (Tennessee) indicates a revenue requirement reduction of $.286 million. Thus, United (Florida, Tennessee) reduced the revenue requirement impact resulting from excess deferred taxes in 1989 by 32 percent and 41 percent, respectively, when compared to 1988 data.

197. We agree with United's position in its reply that amortization of depreciation reserve deficiencies would cause an increase in excess deferred tax flowback. The elimination of this factor in 1989 might result in percentage decreases of the magnitude reported by United (Florida, Tennessee). Thus, we are not requiring any changes for United.

198. We believe that NET did not properly reflect the revenue requirement effect of the flowback of excess deferred taxes on form COS-3. NET's COS-3 reflects a total company revenue requirement impact of $5.2 million. We believe the revenue requirement impact on NET's COS-3 should be approximately $9.2 million.

199. In its reply comments, NET states that workpaper 12.17 in Volume II-2, Section 12 displays the flow through of excess deferred taxes. Our review of this workpaper indicates that NET reflected an incorrect revenue requirement amount on COS-3. Using line 4 of this workpaper we have computed the following revenue requirement impact of flowing back excess deferred taxes.

	Maine	Mass	NHamp	Rhls	Vt	Total
	(Dollars in thousands)					
1. Amort Ex. Tax (adjusted)	2,578	23,360	2,200	1,366	2,754	32,257
2. Interstate Factor	.298	.263	.369	.288	.388	
3. Rev. Req. Ln 1 x Ln 2	768	6,143	811	393	1,068	9,183

200. Thus, since NET has understated the revenue requirement impact of the flowback of excess deferred taxes by $4 million dollars on COS-3 Column G, we believe it has also overstated the interstate revenue requirement shown on COS-3 Column A. Accordingly, we direct NET to reduce interstate revenue requirements by $4 million, as detailed in Appendix E.

6. Levels of Total Company COE Switching Investment

a. Petitions

201. AT&T states that Ameritech, Bell Atlantic, GTOC, NYNEX, US West, and BellSouth as a group have overstated the levels of total company COE switching investment by $1.5 billion, resulting in excessive interstate revenue requirements in the amount of $125.3 million due to overestimating growth. AT&T calculates the overstated interstate revenue requirements to be $10.5 million for Ameritech, $23.8 million for Bell Atlantic, $ 16.6 million for GTOC, $42.7 million for NYNEX, and

$31.7 million for US West.[197] These carriers show an annual growth rate for this investment in the aggregate of 7.37 percent between PYCOS and the test year. Yet, the most recent historical weighted average growth rate is 2.33 percent.

202. AT&T argues that these carriers' forecasts should bear a reasonable correlation to the historical figures. AT&T says that the carriers have given no explanations, and that these carriers had made significant overestimates in 1988. AT&T further notes that the percentage growth in TS minutes of use is only slightly higher (7.29 percent from 6.79 percent). If the historical growth rate is used, it would lower investment by $1.5 billion, and lower by $322 million interstate investment, which would then result in interstate revenue requirements decreasing by $125.3 million. Indeed, AT&T notes that the cost of switching machines is decreasing.[198]

203. MCI states that the LECs have proposed large increases in total company investment in Account 2212 (digital switching investment), citing modernization as the reason. MCI maintains that the LECs are installing packet switching equipment both to deploy a Common Channel Signalling (CCS) network and for their own services to end users. MCI argues that these offerings have not been made to ICs. Thus, MCI concludes that none of this investment should be allocated to the interstate revenue requirement. MCI notes that BellSouth proposes to increase investment in total company digital switching equipment by 129 percent ($1.657544 billion), and increase investment in Account 2211 (analog electronic switching equipment) with only a slight ($138.142 million) decrease in electromechanical switching equipment investment.

204. MCI further argues that Bell Atlantic projects an increase in total company digital switching investment of $411.6 million, $144.2 million in New Jersey alone, while decreasing electomechanical investment by only $172 million. MCI concludes that this cannot be caused by growth or end office modernization, so it is most likely for a CCS network, which MCI alleges holds no benefit for interstate ratepayers. MCI also contends that the NYT increase is $101.8 million, SNET is $64.63 million, Pacific is $120.5 million, NET is $76.9 million, and US West is $73.5 million. MCI states that the Commission should investigate these proposed increases and instruct the LECs to provide details about the digital equipment in Account 2212. MCI states that the LECs should remove these amounts from the interstate revenue requirement until the interstate carriers are offered these new services. MCI asks the Commission to investigate any LEC that proposes to increase electomechanical switching investment that is also increasing digital. MCI argues that US West, NYT, Pacific, Southwestern, and NET deserve special scrutiny.[199]

205. After the LECs filed errata to their data, MCI asked that Ameritech's investment and expense for COE switching also be investigated. MCI especially questions any investment or expense for CCS-7, 800 database, ISDN, or any other alleged network upgrades that are not offered to interstate access customers.[200]

b. Replies

206. Ameritech replies that it used two different methologies for calculating the PYCOS amount and the forecast. It used a separations basis for the PYCOS amount, while for the forecast, Accounts 2210 and 2220 were totalled. The PYCOS amount, according to Ameritech, therefore excluded some small amounts of Accounts 2210 and 2220, and included a small amount of Account 2230. Ameritech concludes that the PYCOS and forecast amounts are not directly comparable. The mismatch results in a higher growth rate for COE investment. Ameritech further alleges that the increases in growth in switched COE investment reported by Illinois Bell is in line with the increased growth rates forecast for total interstate traffic minutes of use in Illinois.[201]

207. Bell Atlantic states that its forecast of digital switching investment in New Jersey is consistent with the prior year investment. Bell Atlantic argues that the investment is part of a switch modernization program, and is being used to improve overall network performance, quality and efficiency. Bell Atlantic further alleges that increased investment in other Bell Atlantic areas is needed as a result of fiber deployment, and for the implementation of a Digital Facility Management System. Bell Atlantic also notes that it operates in a strong local economy where businesses are heavy users of telecommunications services.[202]

208. GTOC links its increased COE investment to growth and modernization. GTOC states that current growth in COE investment ensures that adequate capacity will be available to meet future demand.[203]

209. NYNEX replies that it projected less COE investment for NET for 1989 than was experienced in 1988. NYNEX states that if equal access switching investment is included, the NYT growth rate in COE switching is less than the projected growth in traffic sensitive minutes of use. Finally, NYNEX argues that increased switching investment is needed to replace crossbar and electronic equipment, provide new customer calling features, switch digital signals, and improve quality. NYNEX also contends that petitioners' growth rates did not reflect the six-month gap between the end of the PYCOS period and the beginning of the test year. NYNEX also notes that much of the increased switching investment occurred in the fourth quarter of 1988, but is not included in the PYCOS. NYNEX further states that electromechanical switching investment will increase because of equal access implementation, trunk implementations, frame work, *etc.*[204]

210. Like Ameritech, US West replies that any comparison of prospective and historical data is flawed because the separations process treats power equipment investment in Account 2230 differently from the USOA account categorization, and the rules require separations data be used to calculate the historical data, while account data are used for forecasting. US West states that it projects increases in switch investment that are similar to the 1988 increases. US West claims that more than a third of the growth in Oregon is the result of a separations change in termination counting methodology which affected the distribution of costs to COE Category 4. US West also notes that sound budgeting theory and practice lead to budgeting at the summary level of account, and that disaggregations may be imprecise.[205]

211. BellSouth states that its projections are in line with MCI's expectation that increased digital investment be accompanied by decreased electromechanical investment. BellSouth is continuing to deploy digital switching to meet growth because it will reduce operational and maintenance expenses in the long term, and because it provides the flexibility to provide a wide array of services.[206]

c. Discussion

212. The Bureau has reviewed the tariff filings, the petitions, and the replies, and has conducted our own analysis of Category 2, Category 3, and Category 4 central office equipment investment. For a discussion of our findings regarding Category 4 central office equipment, see Section V.C.4, *supra*. For purposes of this filing, we did not statistically test the levels of investment in Category 1 central office equipment, Operator Systems. Category 1 investment does not lend itself to statistical analysis due to the volitility in the balances in this account occasioned by activities such as the take back of operator services by the LECs. Furthermore, neither petitioners' allegations nor the LECs' replies focused on Category 1 central office equipment.

213. Our analysis of Categories 2 and 3 central office equipment reveals that disallowances are necessary for several companies. For the exact amount of the disallowances for each carrier, see Appendix C. MCI's claims that CCS investment has been misallocated do not appear to be related to revelant Separations Manual provisions. MCI has not described a question that warrants investigation of CCS-7 or 800 database at this time. The fact that the new network features are not yet directly available to ICs is not in itself determinative of whether the associated CCS-7 switching equipment and basic software are used and useful in the interstate jurisdiction.

7. Maintenance Expenses

a. Petition

214. MCI contends that electromechanical (EM) COE is out of date and antiquated. Yet, it states that while several LECs are decreasing their investment in this equipment, they are increasing their maintenance expenses for it. MCI argues that BellSouth proposes decreases in investment in EM COE of $138.142 million (nearly 46 percent) but increases in maintenance expense for this equipment of $2.84 million (over 7 percent). MCI further shows that Bell Atlantic has the same problem: it decreases EM COE investment by $172.251 million (over 65 percent), but increases corresponding maintenance by $9.196 million (almost 34 percent). MCI states that Bell Atlantic (Pennsylvania, Delaware) also includes maintenance expense in areas where there is no equipment. MCI contends further that Cincinnati and Southwestern (Arkansas) propose decreases in EM equipment and increases in related maintenance. MCI claims that this must be an error. MCI states that decreases in investment should cause similar decrease in maintenance and therefore the Commission should investigate.

215. MCI also alleges that LECs have proposed huge increases for maintaining digital switching equipment, which for various reasons is less expensive to maintain than analog. MCI states that BellSouth, NET, Bell Atlantic, and SNET have passed along some efficiencies in that their maintenance expense as a percentage of investment is lower for digital than analog. According to MCI, however, NYT proposes a ratio of expenses to investment of 6.05 for analog and 7.79 for digital. MCI calculates Pacific's analog ratio to be 4.93 and its digital ratio to be 6.62; US West has a 4.58 analog ratio and a 7.49 digital ratio; Southwestern's analog ratio is 2.73 and its digital, 5.82; Cincinnati proposes a ratio of 4.74 for analog but 11.51 for digital. MCI contends that while some of these digital ratios are lower than the historical figures, the higher digital ratios are still suspect. MCI concludes that any increases due to implementation of CCS7, ISDN, or 800 database services should not be charged to interstate, as these services are not offered to interstate customers.[207]

b. Replies

216. Bell Atlantic replies that its allocations of analog and digital maintenance expense were not used in ratemaking, but were made simply based on historical data. Therefore, according to Bell Atlantic, MCI's argument is not material. Bell Atlantic states that its total forecast is reasonable. Bell Atlantic calculates its relationship of maintenance to corresponding equipment to be 6.2 percent for the PYCOS period, and 7.5 percent for the test period. The increase is due to the expensing of right to use fees that began in the last quarter of 1988 and was not reported in the PYCOS data.[208]

217. US West says that additional training and testing is included in maintenance expense as conversion to digital first takes place. Furthermore, US West agrees with Bell Atlantic that conclusions based on the subaccount level are not valid. The summary acount (central office switching), according to US West, has been forecasted to increase by 1.73 percent, and the forecasted percentage of expenses to investment is 5.67 percent in 1989 compared to 5.94 percent in 1988. [209]

218. NYNEX agrees with MCI that one would expect the ratio of digital maintenance expense to digital investment to be lower than the ratio of analog maintenance expense to analog investment. However, NYNEX argues, in the early years after digital cutover, digital maintenance expenses include significant amounts for right to use fees, rearrangements, and changes. Without these costs, NYNEX calculates that the digital maintenance to investment ratio (5.11 percent) would be lower than the analog (5.95 percent).[210]

219. Cincinnati replies that because analog to digital switch-over will not occur until the last quarter of 1989, analog maintenance must continue until the new equipment is brought on line. The actual increase in EM maintenance expense is less than the rate of inflation, according to Cincinnati. Cincinnati further maintains that the increase in digital maintenance expense is largely due to right to use fees for digital electronic switching software.[211]

220. Southwestern states that EM maintenance expense need not decrease with investment because the EM equipment is aging and, thus, overall EM maintenance may increase. Southwestern also states that the maintenance to equipment ratio may be higher for digital than for analog equipment because the company has less experience in maintaining digital equipment and higher costs are incurred for training, right to use fees, and other items.[212] Pacific states that short term higher maintenance costs are typical of new technology. Pacific declares that its maintenance to equipment ratios for digital and analog equipment have decreased since 1988.[213]

221. Rochester states that its forecast of total maintenance expense for digital, EM, and analog investment is accurate and consistent with historical ratios. Rochester says that it is reviewing whether a mistake was made in allocating these expenses among the three accounts. Rochester maintains, however, that any such mistake would not have an effect on rates because the expenses are consolidated for separations and Part 69

purposes.[214] BellSouth states that its TRP contained an accounting misallocation between Accounts 6215 and 6212 that does not affect allocations under Part 64, 36, or 69. Therefore, BellSouth says, interstate revenue requirements do not change due to this error.[215]

c. Discussion

222. The Bureau has reviewed the petitions and the replies, and we have undertaken our own analysis of central office switching maintenance expenses. For purposes of this annual filing, we have analyzed this account only at the Class B account level, and have not undertaken to perform statistical tests of the amounts allocated to subaccounts such as digital, analog, or electromechanical maintenance. Tested at the class B account level, the data submitted by the carriers display significant deviations in so many cases that further disaggregation did not appear appropriate. However, we wish to emphasize, contrary to the assertions of Bell Atlantic and others and with regard to other accounts, that we expect the LECs to provide data at the class A account level that is appropriate for ratemaking purposes, and not merely allocated based on historical ratios.

223. We have determined that certain carriers' projections appear to be unreasonable. For further details of the actions we are taking in this Order with regard to disallowances correcting for these faulty projections, see Section V.C.1, *supra*, and Appendix C.

8. Payments to Bellcore

a. Petition

224. MCI states that it and other interstate ratepayers do not receive any benefit from Bellcore research and development and thus this cost should not be allocated to the interstate jurisdiction. MCI alleges that all carriers, especially NYT, NET, and Cincinnati, should remove Bellcore payments from their interstate revenue requirements. In addition, MCI wants the Commission to require LECs to document specifically all centralized service expenses by type of expense.[216]

b. Replies

225. Ameritech says Bellcore provides many staff, research, and engineering functions including coordination of federal government national security and emergency preparedness activities, development of technical specifications and performance standards for interconnecting local and exchange networks, and development of specifications and technical standards and quality assurance evaluation of vendor products. Ameritech states that ICs do benefit from Bellcore research and development activities such as the development of new semiconductor materials, a new mechanized ordering system, and vendor specifications and requirements for CCS7 interconnection capability to improve FGD access capabilities, increase capacity, and lower costs.[217]

226. Bell Atlantic cites a NARUC study which found that Bellcore's accounting standards and costs are reasonable, there is no duplication of efforts between Bellcore and the RBOCs, Bellcore's services benefit the public, and Bellcore's research is necessary to meet MFJ requirements and to set technical performance and equipment specifications.[218]

227. US West states that it uses Bellcore to support many existing operating services and systems, and to acquire essential technologies to improve customer service and efficiency. US West argues that MCI does not understand Bellcore's work, and MCI's recommendation should be rejected.[219] NYNEX says that the majority of Bellcore's work is maintaining, enhancing, and developing the telecommunications network, and it provides benefits to all users. Bellcore, according to NYNEX, allows the RBOCs to avoid the greater cost of performing the functions and services of Bellcore on their own.[220]

228. Cincinnati states that it contracts with Bellcore for viable and tangible services including fundamental support for the local exchange network. However, research and technical expertise for the local loop enhance service for the ICs as well, says Cincinnati, because without the local network, the company could not offer interstate access.[221] BellSouth states that Bellcore has assisted in the development of technical standards and requirements for telecommunications equipment in an interactive process with the member companies, vendors, and ICs. BellSouth claims that Bellcore has also developed billing and service order processing systems for interstate and intrastate access services.[222] Finally, Pacific alleges that it receives from Bellcore services related to separations, access charge filing support, and operations systems, all of which are required to provide interstate access services.[223]

c. Discussion

229. We have reviewed the tariff filings, the petitions, and the replies and are not persuaded that any compelling argument has been presented that disallowance or investigation of these expenses is warranted at this time. Our rules allow the LECs to allocate a portion of Bellcore expenses to regulated interstate access service, and there is no evidence that the carriers have violated the Commission's rules. MCI's request that these expenses be disallowed would appear more appropriately to be a petition for Rule Making seeking to have the Commission find that Bellcore expenses should not be allocated to the interstate jurisdiction. Such a change to the Commission's separations procedures is beyond the scope of this proceeding.

9. Corporate Operations Expense

a. Petitions

230. MCI states that NYT proposes an increase in Executive and Planning (E&P) expense of 56.9 percent on a total company basis. MCI adds that NYT has decreased its construction budget by 9.8 percent, so planning would not appear to be the source of the increase. MCI concludes that salaries must be the cause. MCI also says that NET seeks to increase E&P expense while its construction budget decreases by 7.2 percent. MCI contends that the Commission should investigate whether E&P expenses are being adequately allocated to nonregulated activities. MCI says that increases should be in line with inflation. MCI also challenges NYT's proposed increases in legal expenses of over 10 percent, saying that this increase is perhaps due to MFJ activity that should not be allocated to interstate.

231. MCI argues that NYT has a timing problem with regard to human resource expenses and the Commission should direct NYT to correct this in its proposed rates.

MCI purports that NET (Vermont) increases external relations expense by 14.11 percent without reason while decreasing the allocation of this expense to nonregulated activities by 5.99 percent. MCI notes that NYT has proposed expense increases for the Part 32 procurement account of 24.09 percent without justification, and argues that procurement should not increase if construction budgets are decreasing. MCI further alleges that NYT seeks to increase total company expense for Information Management (IM) by almost 20 percent.[224]

232. MCI alleges that Cincinnati proposes to increase executive expenses by 38.7 percent and planning expense by 25.3 percent without explanation. According to MCI, if executive salaries are tied to financial performance, a spiral occurs where overearnings lead to higher rates, which lead to overearnings, and so forth. MCI also notes that Cincinnati seeks to increase its total company budget for IM by almost 41 percent, purportedly to implement a new benefits plan. MCI states that no other reasons are given, nor are other offsetting cost decreases apparent. MCI surmises that automation should decrease expenses. MCI maintains that Cincinnati increases expenses for human resources in excess of 48 percent due to a new employee benefits program, in addition to the above increases in information management for the same reason. To MCI, this magnitude seems unreasonable and should be financed by stockholders if they voted for this new program.[225]

233. MCI notes that Rochester has proposed expense increases for the Part 32 procurement account of 58.64 percent without justification. MCI states that procurement should not increase if construction budgets are decreasing. MCI also alleges that Rochester increases regulated expenses for external relations by 9.61 percent while decreasing nonregulated by 17.39 percent. MCI further argues that Rochester seeks to increase total company expense for IM by 106 percent.[226]

234. MCI contends that Southwestern (Missouri) proposes increases in legal expenses of over 18 percent, possibly due to a state investigation. If this is the reason, MCI argues, these expenses should not be allocated to interstate. MCI notes that Southwestern proposes human resource expense increases for Kansas, Arkansas, and Texas without adequate justification. MCI notes that Southwestern (Oklahoma) has proposed expense increases for the Part 32 procurement account of 43.54 percent without justification. MCI states that procurement should not increase if construction budgets are decreasing. MCI claims that Southwestern (Arkansas, Texas, Kansas) increases regulated expenses for external relations by 10.81 percent while decreasing nonregulated by 5.99 percent.[227]

235. MCI asks the Commission to ensure that Ameritech (Illinois) has reduced its procurement expenses as promised in Ameritech Transmittal No. 206, filed August 5, 1988. MCI also objects to BellSouth's increase in total company IM expense of almost 75 percent. MCI notes that Pacific has proposed expense increases for the Part 32 procurement account of 10.67 percent, and SNET 48.67 percent without justification. MCI states that procurement should not increase if construction budgets are decreasing.[228]

236. US Sprint argues that, except for Nevada and US West, all carriers increased corporate operations expense. US Sprint declares that particularly large increases are estimated for all RBOCs and SNET. US Sprint calculates the straight average increase to be $58.4 million, and alleges that the explanations are inadequate. The total is predicted to increase over 1988 annualized actual amounts by 10.1 percent ($653.5 million). US Sprint requests that increases be limited to the inflation rate absent full justification.[229]

237. Based on errata filed by the LECs, MCI also alleges that Ameritech (except Michigan) projects excessive increases in corporate operations expense. MCI further argues that when compared to 1988 projections, the LECs' 1988 actuals for BellSouth, Pacific, Nevada, Bell Atlantic, SNET, Southwestern, Ameritech, and US West reveal severe overspending on corporate operations expense.[230]

b. Replies

238. Rochester replies that the growth in regulated external relations expense is attributable to a general rate case filed before the New York Public Service Commission as well as to compliance with state regulatory requirements ($220,000). Rochester says that these costs are assignable directly to regulated operations. Rochester admits that it made an error in computing procurement expenses with respect to inside wire and says it will rectify this error, causing a rate reduction of less than 2 percent. However, Rochester maintains that its remaining procurement costs are reasonable, considering that its construction budget has not decreased; on the contrary, Rochester intends to add over $19 million in new investment in 1989.

239. Rochester says that the increase primarily reflects additional employees necessary to handle the increase in purchasing and general salary increases ($120,000). The increase in IM expense, according to Rochester, is attributable to the incremental expense to completely rewrite and overhaul the corporate information system and replace existing outmoded stand alone systems with a centralized data base. In 1989, Rochester estimates the cost of this implementation will add about $2.9 million to total company expenses. Also, Rochester claims that calendar year IM expenses were understated in the PYCOS data due to substantial expenditures in the fourth quarter. Thus, Rochester says that the growth in IM expenses is not as great as claimed by MCI.[231]

240. Cincinnati first states that anomalous results occur when PYCOS data are compared to 1989 forecasts because Cincinnati experiences increased spending during the last quarter due primarily to inflation and wage increases that take effect in August. Cincinnati states that the expenses for E&P are reasonable when viewed on an interstate basis, rising by only $115,000 and $27,000, respectively. Cincinnati further maintains that the increase in executive expenses is due to inflation, wage and salary increases, consulting fees, and the filling of a vice presidential position that had remained vacant for half of 1988. Planning expenses increase primarily due to various technological advancements and the expanding number of new services. Cincinnati states that it is in compliance with the Commission's requirements for the allocation of costs to nonregulated activities. In addition to the new benefits plan, causes for the increase in IM expenses include IRS compliance testing, ordering changes, and data processing changes. Other costs are associated with new projects that are in the development and installation stages and will produce long term savings in the future. Cincinnati says that a significant portion of the increase in human resources expense is the compliance testing

requirements of the 1986 Tax Reform Act and the new benefit plan, which although costly to develop, install and test, will hold down future costs.[232]

241. NYNEX replies that its companies do not budget their expenses at the level of accounting that MCI attacks, although they do conduct their actual accounting at that level. NYNEX merely used an historical ratio to assign prospective costs to the Class A accounts from the more summary Class B accounts. Thus, NYNEX maintains, historical data can only be compared to prospective data meaningfully at the larger account level. NYNEX projects only a 3.5 percent growth in total operating expenses for NYT and 5.5 percent for NET. NYNEX states that within these reasonable ranges, management should be free to allocate resources while keeping costs down. NYNEX explains the increases in corporate operations expense for NET are primarily due to centralized services and employee benefits. For NYT, NYNEX maintains that the normalized growth rate in E&P expenses is actually only 16 percent, not 56.9 percent, after correcting for an overaccrual in 1987. The balance of the test year increase for NYT, according to NYNEX, is for benefits, non-wage costs, and increases in force. NYT's general and administrative expenses will grow primarily due to payments to NYNEX affiliates and benefits for retired employees.[233]

242. SNET states that its procurement expenses are less than two tenths of one percent of total company expenses, and cannot be directly related to its construction program. SNET says that these expenses are more closely related to operational improvements.[234]

243. BellSouth disputes MCI's assertion that its IM expenses increased by 75 percent, alleging that MCI used an incorrect historical amount in the comparison. BellSouth claims that the total company increase based on TRP data is only 22 percent, but that after the effect of certain accounting changes is removed, only a 6.6 percent increase results. With respect to external relations expense, BellSouth explains that an accounting error caused projected amounts for certain overhead expenses to be placed into the external relations account instead of accounts 6711, 6712, 6721, 6722, 6723, and 6725. BellSouth states that the subject to separations increase over the historical period for all six accounts combined is only 14 percent.[235]

244. Ameritech replies that Illinois Bell's increase in corporate operations expense of 6.47 percent ($19 million) is due to increases in nonregulated expense ($2 million), medical benefit expenses ($5 million), 1989 contract bargaining ($2 million), additions in force to meet general growth ($2 million), and 2.7 percent inflation ($8 million). In Indiana, Ameritech explains the 8.91 percent ($10.2 million) increase as partially attributable to an accounting change in which certain expenses booked to plant specific accounts will be booked to corporate operations in 1989. When corresponding costs are compared, Ameritech estimates its increase in corporate operations expense in Indiana to be 4.51 percent ($5 million).[236]

245. Southwestern maintains that its corporate operations expenses are reasonable, showing only a 3.4 percent increase with inflation estimated at 4.8 percent. Southwestern does not estimate this 3.4 percent, however, from the appropriate TRP charts because Southwestern maintains that these charts show a larger increase due to timimg differences. Southwestern further argues that total company legal expenses are expected to decline for 1989, and no additional legal expenses were included for the Missouri investigation. Southwestern argues that its human resources expenses are justified by the 4.8 percent overall inflation forecast, as well as by increased training, expenditures for college recruiting, recruiting of experienced managers, and outside consultants. Southwestern also states that it increased the percentage of corporate human resources expenses allocated to Texas. Southwestern states that in Oklahoma, its increase in procurement expense was only 5.9 percent, not 43.54 percent as alleged by MCI, and that in any case, these expenses are not directly related to the construction budget. With respect to external relations, Southwestern responds that MCI's attempts to identify meaningful variations between regulated and nonregulated allocations at the subaccount level are inappropriate.[237]

246. Pacific contends that its construction budget is increasing in 1989, but that because it procures more than just construction materials, increases in total corporate operations and network usage must also be considered in setting procurement costs.[238] Bell Atlantic states that its growth in total company corporate operations of 4.42 percent is below the rate of inflation forecast for 1989, and is necessary to meet the growing workload of the company.[239]

c. Discussion

247. The Bureau has reviewed the petitions and the replies, and we have undertaken our own analysis of corporate operations expenses at the total company subject to separations level. With respect to corporate operations expense, as well as plant non-specific expenses, customer operations services expenses, plant-specific expenses and marketing expenses, we believe that a more meaningful analysis can be performed after removal of nonregulated expenses.

248. Moreover, as mentioned in Section V.C.6.c, *supra*, for purposes of this annual filing, we have not analyzed all of the Class A accounts, but rather have tested the total Executive and Planning and total General and Administrative forecasts (discussed above). Tested at the class B account level, the total Executive and Planning data submitted by the carriers display significant deviations in so many cases that further disaggregation did not appear appropriate. We have determined that certain carriers' projections appear to be unreasonable. For further details of the actions we are taking in this Order regarding this issue, see Section V.C.1, *supra*, and Appendix C.

10. Increases in Total Company Plant Non-Specific Expenses

a. Petition

249. US Sprint alleges that Bell Atlantic, Ameritech (Illinois), and NET show increases in total company plant non-specific expenses less depreciation of over 13 percent without adequate explanations. US Sprint contends that increases in plant-specific and non-specific expenses should be limited to 1988 ratios of such expenses to plant.[240]

b. Replies

250. Bell Atlantic replies that its projected growth of 13.7 percent is due to increases in costs for materials and contract services, increases in management and non-man-

agement wages, the rapidly increasing costs of benefits, and a slight increase due to the expensing of right-to-use fees.[241]

251. Ameritech replies that in Illinois, the 14.36 percent increase is due to increases in nonregulated expenses ($3 million), increases in work force due to above average growth in access lines and switched services demand ($8 million), start-up costs for a project expected to provide operating efficiencies in the future ($6 million), above average increases in medical and other benefit expenses ($3 million), and anticipated increases due to centralized services and inflation ($14 million). Ameritech also explains that in Michigan, the projected growth in these expenses is less than the expected CPI growth rate, and gives other explanations for the predicted growth in these expenses in its other jurisdictions. [242]

252. NYNEX attacks US Sprint's basic position that expenses should not grow faster than the rate of inflation. NYNEX states that this theory fails to take into account new construction programs, increased depreciation, reallocations of corporate resources, improvements to service, and competitiveness. NYNEX says US Sprint's calculation of NET's 13 percent growth in plant non-specific expenses is due in part to US Sprint's failure to use a compounded annual growth rate that takes into account the six-month gap between the end of the PYCOS period and the beginning of the test period. Using such a compound growth method, NYNEX claims the NET growth rate for plant non-specific expenses to be only 10.2 percent. This growth is caused, according to NYNEX, by increased plant and engineering labor expenses for network rearrangements and modernization efforts to provide higher quality service and to meet equal access obligations. There will be an increase in digital switching investment and network administration, network provisioning, engineering, and testing. Employee benefit costs will also increase.[243]

c. Discussion

253. In general, plant non-specific expenses encompass the expenses associated with Accounts 6510-6565. The majority of the expense in plant non-specific accounts appears in network operations expense, access expense, and depreciation and amortization expense. Most LECs do not have significant access expenses. Depreciation and amortization expenses are discussed elsewhere in this Order. The Bureau has conducted our own analysis of network operations expense. The other subcategories of plant non-specific expenses do not lend themselves to statistical analysis due to their small absolute dollar amount, except for depreciation and amortization. Although depreciation and amortization expense is not a small account, its analysis is best accomplished in other ways, as discussed in the separate section relating to depreciation and amortization. *See* Section V.C.2, *supra*. Further, the other subcategories do not contain a significant relative amount of the total network operations expense.

254. Based on our analysis of network operations expense and our review of the petitions and the replies, the Bureau finds that, for the most part, the LECs' forecasts of network operations expense are not unreasonable, except as indicated in Appendix C. Our analysis also finds the rest of the projections of plant non-specific expenses are not so unreasonable as to warrant disallowances and, therefore, petitions are denied except as indicated above.

11. Increases in Total Company Customer Operations Services Expenses

a. Petition

255. US Sprint claims that Ameritech (Illinois, Indiana, Wisconsin), Bell Atlantic, BellSouth, and Nevada show increases of 10 percent or more in customer operations services expenses without adequate explanations. US Sprint argues that increases in overhead expenses should be limited to the inflation rate.[244]

b. Replies

256. Ameritech states that when actual calendar year 1988 expenses are compared to projected calendar year 1989 expenses, all of its jurisdictions show decreases or minimal increases except Indiana, which still displays an increase of only 7.15 percent ($6.1 million). Ameritech says that a new billing system accounts for $.6 million, an increase in headcount to respond to market demand accounts for another $.6 million, conversion to a new directory assistance system accounts for $1.1 million, and inflation accounts for the remaining $3.8 million.[245]

257. BellSouth responds that it has corrected its total company amount of customer operations expense pursuant to special permission, but US Sprint's analysis is nevertheless misleading because US Sprint compares total company amounts prior to Part 64 assignments. BellSouth states that when its subject to separations amounts are considered, the projected increase is only 6.7 percent.[246]

258. Bell Atlantic maintains that the growth in its customer operations expenses is caused in part by the take-back of operators from AT&T in New Jersey and the C&P jurisdictions. This take-back, according to Bell Atlantic, adds approximately $74 million in 1989, raising Bell Atlantic's customer operations service growth rate from 6.9 percent to 13.8 percent.[247]

c. Discussion

259. In general, Customer Operations Expenses encompass Marketing Expenses and Customer Operations Services Expenses contained in Accounts 6610 and 6620. Marketing Expenses are discussed separately in Section V.C.14, *infra*. Customer Operations Services expenses are assigned to three categories: telephone operator services, publishing directory listings, and all other. The "all other" category is further subdivided into local business office expense, customer services expense (revenue accounting), and all other customer services expense. The majority of the LEC expense in the category covering all other customer operations service appears in the first two subcategories, local business office and customer services (revenue accounting). Included in customer services (revenue accounting) is the revenue accounting expense comprising the salaries and other expenses associated with the billing of customers and the accounting for revnues.

260. The Bureau has conducted our own analysis of the three major portions of Customer Operations Expense; *i. e.*, marketing expenses, local business office expenses and customer services (revenue accounting) expenses. The other subcategories, telephone operator services, published directory listing, and all other customer services expense, do not lend themselves to statistical analysis due to their volatility or small absolute dollar amount. Further, the "all other" customer services expense does not contain a significant relative amount of the total of these general

expenses. The results of our analyses of marketing expenses can be found in Section V.C.14, *infra*. Our analysis finds that the projections of local business office and customer services (revenue accounting) expenses of certain companies are unreasonable and warrant disallowances as detailed in Appendix C.

12. Total Company Plant-Specific Expenses

a. Petition

261. US Sprint claims that Ameritech, Bell Atlantic, and BellSouth increased total company plant-specific expenses by $127 million, $139.7 million, and $335.8 million, respectively, without adequate explanations. US Sprint again contends that increases in plant-specific and non-specific expenses should be limited to 1988 ratios of such expenses to plant.[248]

b. Replies

262. Ameritech replies that actual 1988 calendar year plant specific expenses do not differ markedly from projected 1989 calendar year plant-specific expenses in Indiana, Michigan, and Ohio. In Illinois, plant specific expenses increase by 6.25 percent ($35 million) for several reasons. Increases in nonregulated expenses account for $10 million. An additional $10 million is for the addition of employees in 1989 to help handle work associated with rehabilitation and replacement of aging sections of the company's distribution facilities. The remaining increases are caused by above average medical and other benefit expenses ($3 million) and inflation ($12 million). Wisconsin's increase of 8.72 percent ($14.5 million) is a result of the increase in the expensing limit for furniture and equipment ($2 million), updating of the aging motor vehicle fleet by replacement with leased vehicles ($2 million), leasing computers ($1.1 million), additional costs for hardware maintenance and database usage to handle capacity and switching feature requirements and to upgrade corporate communications facilities ($2 million), and inflation ($7.4 million).[249]

263. Bell Atlantic states that it did not begin expensing right-to-use fees until the fourth quarter of 1988. The forecast for 1989 contains some $92 million for this item, while the PYCOS period did not include any of such costs. This one item raises the growth rate for plant specific costs from 2.6 percent to 7.59 percent. Bell Atlantic also claims there have been increases in maintenance expense and one time rearrangement costs in conjunction with modernizing COE plant.[250]

264. BellSouth contends that the 14.41 percent increase calculated by US Sprint is not representative of the increase for regulated expenses, which is only 5.6 percent. BellSouth adds that the ratio of regulated plant specific and non-specific expenses to telephone plant in service for both the historical and the test period is approximately the same, 10 percent.[251]

c. Discussion

265. In general, plant-specific expenses encompass the expenses associated with Accounts 6110-6441. The majority of the expense in plant specific accounts appears in general support expenses, central office switching maintenance expense, central office transmission maintenance expense, and cable and wire facilities maintenance expense. Central office switching maintenance expenses are discussed in Section V.C.7, *supra*. The Bureau has conducted our own analysis of general support expenses, central office transmission maintenance expense, and cable and wire facilities maintenance expense. Based on our analysis of these expenses and our review of the petitions and the replies, the Bureau finds that certain LECs should make disallowances as outlined in Appendix C.

13. Assumptions of Consumer Price Index (CPI)

a. Petition

266. ALC argues that Bell Atlantic estimates the 1989 CPI markedly higher than all other RBOCs, at 5.1 percent. ALC contends that Pacific also uses a high forecast, 6.0 percent. This results in overstated revenue requirements, according to the petitioner. In contrast, ALC notes that US West uses 3.9 percent. ALC asks that RBOCs using CPIs higher than the CPI used by US West recast their switched and special access rates using CPIs not exceeding that of US West. ALC states that the Commission should require all carriers to use one standard CPI level, consistent with the approach proposed in the price cap model.[252]

b. Replies

267. Ameritech replies that it used the CPI for urban wage and clerical workers as one of the primary economic assumptions of its total company budget. Ameritech disputes ALC's suggestion that economic growth is the same throughout the United States, saying that Ameritech's CPI assumption was modified to reflect region specific data. Ameritech concludes that its CPI assumption is reasonable and does not overstate revenue requirements.[253]

268. BellSouth states that its CPI values were developed by its economists taking into account independent studies of the national economy. BellSouth adds that none of the petitioners has shown its CPI to be unreasonable, and its CPI value is the lowest of all the LECs compared by ALC. According to BellSouth, US West's CPI value was quoted by ALC incorrectly.[254]

269. Bell Atlantic attacks ALC's position as unjustified. Bell Atlantic argues that the inflation expectations in a region are influenced by local conditions, as well as national trends. Bell Atlantic states that its forecast is reasonable when compared with Blue Chip Economic Indicators forecasters, considering Bell Atlantic's prediction of 5.1 percent fell within the Blue Chip range of 3.3 to 6.2 percent.[255]

270. NYNEX contends that significant regional variations in price movement occur as a result of product availability, demand, income, *etc*. NYT uses both a U.S. All Urban CPI of 4.3 percent and a New York Metro CPI of 5.2 percent. NET uses a New England regional CPI of 4.4 percent. NYNEX maintains that adoption of a single standard CPI would be arbitrary and unsupported.[256] Southwestern defends its CPI forecast of 4.8 percent because the "Blue Chip Consensus" showed an almost identical CPI projection for 1989, 4.7 percent.[257]

c. Discussion

271. We have reviewed the tariff filings, the petitions, and the replies, and are not persuaded that any compelling argument has been presented that disallowance or investigation of the carriers' rates is warranted solely on the basis of divergent CPI factors.

272. Moreover, the Bureau has conducted our own statistical analysis of the LECs' major investment and expense categories, and we are ordering disallowances in any case in which a carrier has predicted unreasonable growth in any of the categories analyzed. If a carrier has incorporated an unreasonably high CPI factor into its ratemaking process, the result of that factor will be detected in our statistical analysis, and appropriate reductions will be ordered. Thus, any overstatement of revenue requirements due to inflated CPI factors will be remedied indirectly.

14. Projected Growth in Marketing Expense

a. Petitions

273. AT&T maintains that the growth in total company marketing expense of seven LECs (Ameritech (Wisconsin), Bell Atlantic, BellSouth, Contel (California, Texas), GTOC (Florida), NYNEX, and United (Indiana)) ranged from 14 percent to more than 82 percent from the PYCOS period to the test period. The average growth rate for the remaining LECs was only 4.47 percent. Using this average rate, the total company marketing expense for these seven LECs appears excessive by approximately $135 million, of which approximately $40 million is interstate. Only NYNEX and BellSouth provide any explanation at all. AT&T states that NYNEX cites competition as causing the need for more marketing, but that reason is not acceptable because there is little competition in NYNEX's regulated service, local exchange service. AT&T says that although BellSouth blames the increase on new offerings such as Open Network Architecture (ONA), PulseLink, and FlexServ, BellSouth provides no showing that these services will be subject to enough competition to justify the proposed marketing expenses.

274. AT&T alleges that BellSouth and NYNEX also suggest that their marketing espenses appear high because of high fourth quarter marketing expenses not reflected in the PYCOS data. In 1986 and 1987, NYNEX and BellSouth did not incur extraordinary total operating expenses in the fourth quarter, according to AT&T. Moreover, AT&T contends that the other LECs did not incur extraordinary marketing expenses in the fourth quarter in 1988. Thus, AT&T concludes that the Commission should investigate the substantially increased marketing expenses.[258]

275. MCI states that numerous LECs are dramatically inflating proposed spending on marketing. They have supposedly proposed multimillion dollar increases in Account 6610 expenses. MCI says that BellSouth, for example, requests a $39.2 million (50 percent) increase in total company Account 6611 (Product Management) expenses leading to a $21.8 million (28 percent) increase in the amount subject to separations; Bell Atlantic seeks a $30.7 million (30 percent) increase in subject to separations Account 6612 (Sales) expenses; NET requests a $17.7 million (59.3 percent) increase in Account 6613 (Advertising) expenses. According to MCI, BellSouth attempts to justify these increases by stating that its 1988 actuals exceeded its 1988 forecast by 30 percent, which MCI says has no bearing on 1989 projections. MCI recites BellSouth's second reason as increased marketing expenses for ONA, Pulseline, and Flexserv. MCI claims that these services are not interstate access services and therefore these costs should not be allocated to access.[259]

276. MCI characterizes NYNEX's explanation as increased payments by NET and NYT to NYNEX, payments which have come under serious suspicion in New York and Massachusetts state ratemaking proceedings. MCI requests that the Commission investigate these payments also. According to MCI, NET also says that advertising to large intraLATA users has been increased slightly, while MCI calculates that these Account 6613 expenses have increased 61 percent. MCI argues that these expenses should not be allowed into the interstate revenue requirement. MCI contends that Bell Atlantic, Pacific, and Ameritech have given no explanations for their Account 6610 increases. MCI concludes that probably none of these increases is related to interstate access. As such, MCI asks the Commission to disallow any increase in interstate Account 6610 expense over the PYCOS period pending Joint Board revisions to current rules for allocating marketing expenses.[260]

277. US Sprint declares that particularly large increases are estimated for all RBOCs and SNET for marketing expense. This is predicted to increase over 1988 annualized actual amounts by 18.05 percent ($292 million).[261]

278. Based on the LEC errata filings, MCI further concludes that Ameritech is projecting unreasonable increases in its marketing expenses. In addition, although MCI admits that BellSouth has adjusted its historical marketing expense figure upward, MCI still alleges that the resultant 1989 percent increase for BellSouth is unreasonable. Finally, MCI argues that BellSouth and many of the other LECs have historically projected marketing expenses in excess of the level that the companies are subsequently able to spend. MCI demonstrates that BellSouth, Pacific, Nevada, Ameritech, Bell Atlantic, and NYT have filed lower actual 1988 marketing expenses than they projected in their 1988 annual access tariff filings. MCI asks that the Commission disallow all increases in marketing expense for 1989.[262]

b. Replies

279. Rochester replies that its forecasted increase in marketing expense is 8.76 percent, attributable to promotion of new service offerings made possible by the installation of new digital equipment. Promotion of these services is intended to increase usage of the network.[263]

280. Bell Atlantic replies that it has forecasted a 23.29 percent increase in marketing expenses for advertising, increased sales force, and increased product planning and development. Bell Atlantic states that marketing is increasing as a response to competition in alternative operator services products, special access, and other network services including access, to prevent losses to bypass. Bell Atlantic maintains that marketing expenses do not necessarily grow only in proportion to inflation, but are influenced by competition, complexity of service offerings, and level of customer demands.[264]

281. BellSouth projects that its regulated marketing expenses will increase at a reasonable annual rate of 5.2 percent. BellSouth states that MCI and US Sprint have compared marketing expenses that include amounts for unregulated activities. According to BellSouth, AT&T compares amounts subject to separations, and Ad Hoc compares amounts for total interstate access. Furthermore, BellSouth states that comparisons derived from the TRP data are not accurate, because of differences in time periods being compared. BellSouth alleges that 30 percent

of its actual 1988 marketing expenses were incurred during the last quarter, a period not reflected in the PYCOS period. In 1987, the percentage was also 30, and in 1986, 28 percent.[265]

282. BellSouth states that the PYCOS estimate itself was thus understated by 6.7 percent. BellSouth disputes AT&T's calculated industry average growth in marketing expenses of 4.47 percent, because AT&T's analysis has deliberately excluded the high percentage companies. When these are included, BellSouth calculates an industry average of 10.4 percent. BellSouth states that MCI's request to freeze marketing expenses pending Joint Board action should be denied as in excess of the Commission's authority. BellSouth concludes that marketing expenses are essential for the overall viability of the BellSouth companies' business, and are either directly or indirectly beneficial to access customers.[266]

283. Contel states that its expenses in California and Texas appear high due to a reclassification of expenses among accounts. Certain expenses were booked to Account 6722 (Corporate Operations) or 6532 (Network Administration) for the PYCOS period but are booked to Account 6612 (Marketing Expense) for the test period. This accounts for $2 million in California and $720,000 in Texas. Moreover, California will see an increase in the number of employees, causing another $323,000 in marketing expense. In Texas, conversion to one party service will increase advertising expense by $500,000. Contel calculates the remaining growth to be reasonable, only 6.3 percent for California and 7.4 percent for Texas. Finally, Contel finds MCI's request that marketing expenses be frozen to be unfounded, improper, and contrary to the current Commission rules.[267]

284. GTOC explains that in Florida, 27 percent of its marketing expense was incurred in the fourth quarter of 1988 and not reflected in the PYCOS data. Also, because actual data from the first quarter of 1989 are not included in the forecasted test year, 1989 figures are overstated slightly. Thus, GTOC calculates its projected 1989 growth in marketing expenses to be $5.8 million, not $6.9 million as claimed by AT&T. Of that amount, $2.1 million is for increased advertising to encourage network usage and provide commissions for the sale of network business services such as WATS and foreign exchange service. Inflation is also a cause. GTOC also takes issue with MCI's request that marketing expenses be frozen, saying that MCI's argument is misplaced because the Joint Board is already considering revisions to the marketing expense allocation rules. GTOC states that it has applied the current marketing expense separations rules properly.[268]

285. NYNEX replies that increases in all cost categories cannot be tied to the inflation rate because that would not take into account new construction programs, increased depreciation or reallocations of resources to meet strategic plans or to improve service and competitiveness. NYNEX also says that the PYCOS period does not accurately reflect 1988 actuals. Because of the way contractual services are billed, fourth quarter marketing expenses constitute more than 32 percent of the annual total. The increase of 1989 test year marketing expenses over actual 1988 expenses is only 9.7 percent for NET and less than 4 percent for NYT, according to NYNEX. A comparison to the actual 1989 forecast (instead of the test year which is a nine-month forecast annualized) results in a growth rate of 6.2 percent for NET, NYNEX states. These growth projections are due primarily to increased marketing efforts aimed at large business customers.[269]

286. Interstate access marketing activities include those performed by a related NYNEX company that has frequent contacts with ICs, produces publications, develops and manages access products, develops access sales plans and brochures, prepares account analysis, and holds seminars and conferences for ICs. Another related company whose expenses were challenged by MCI provides sales activities and account management. NYNEX states that sophisticated customers require significant access marketing services because of the alternatives available to them. The related companies solicit sales, perform sales negotiations, interpret access tariffs, and work with customers. Additional marketing expenses are also geared toward promoting new or relatively new services such as High Capacity, 900 Access, 0- Pass-Through, and various features of NET's new fiber network. NYNEX also argues that it has followed the correct separations procedures, contrary to MCI's claim that the allocation to interstate should be frozen. NYNEX categorizes MCI's argument as an "ill-timed request to reconsider existing separations practices."[270]

287. United states that its marketing expenses in Indiana were extremely low in 1988, so that an increase in expenses, while modest in absolute numbers, appears large as a percentage. The increase is primarily due to a reclassification of expenses from Commercial to Marketing and increased advertising of regulated vertical services. Still, United claims, its ratio of marketing expense to total operating expenses for 1989 will be 1.76 percent, while the industry average is 4.94 percent. United says that it plans to spend just $5.98 for marketing per access line, while the industry average is $17.50. Thus, United states that these marketing expenses are not excessive.[271]

288. Ameritech (Wisconsin) replies that the Joint Board has yet to recommend a change in the separations procedures for marketing expense. Therefore, it maintains that the MCI comments about freezing the interstate allocation of marketing expense should be ignored. In any event, Ameritech says that when Wisconsin Bell's marketing expense increase is restated to compare calendar year 1988 and calendar year 1989 figures, its rate of increase becomes only 6.7 percent ($2.4 million), because a disproportionate percentage of the marketing expenses in Wisconsin (33 percent) are attributable to the fourth quarter. The 6.7 percent increase is due primarily to increases in salaries and wages ($1.5 million) and training for additional employees in private line repricing and as liaisons between marketing planners and their customers. The rest of the increase is for advertising and inflation.[272]

289. Pacific projects an increase in marketing expense of 10.12 percent reflecting deflated 1988 actuals due to many personnel vacancies in marketing, and a redeployment of personnel in 1989 to marketing and customer service from positions formerly accounted for as plant-specific and non-specific expenses. Moreover, Pacific says that the PYCOS figure does not reflect that the fourth quarter typically has the most marketing expense. Pacific calls MCI's marketing expense freeze request "ludicrous," because Pacific says that it has properly allocated its marketing expenses under the Commission's Orders as presently in effect.[273]

290. Southwestern states that it has only requested a minor increase, due primarily to inflation and the increased number of employees needed to expand marketing operations.[274]

c. Discussion

291. The Bureau has initiated our own analysis of marketing expenses and, based on that analysis and the petitions and replies, we have determined that some of the LECs forecast unusually high expenses in this category. Thus, we are ordering disallowances as detailed in Appendix C. We agree that separations or access allocation rules cannot be challenged in a tariff proceeding. The disallowances we have adopted are based upon our analysis which indicates that those companies have projected total unseparated regulated marketing expenses that appear to be excessive.

15. Predicted Demand Growth and Regional Economic Outlooks

a. Petition

292. MCI argues that traffic sensitive (TS) usage growth should follow economic indicators such as level of employment, housing starts, and personal income growth. MCI states that Bell Atlantic, NET, NYT, Ameritech (Indiana, Michigan, Ohio, Wisconsin), NWB, and Pacific have predicted declines in the growth of TS minutes. MCI alleges that while Bell Atlantic does not adequately explain the raw data assumptions used to predict its growth rate, independent sources indicate that personal income is expected to increase in the Bell Atlantic region by 7.3 percent, twice as fast as the national average. MCI concludes, therefore, that Bell Atlantic's TS demand should grow at a higher than average pace. MCI also says that the Bureau reported interstate switched access minutes to have a growth rate of 13.5 percent, but Bell Atlantic's corresponding growth rate is only 11.8 percent, not even 13 percent. MCI asks the Commission to require Bell Atlantic to increase its demand figure.[275]

293. MCI also claims that NYT and NET are predicting growth rates 10 percent less than their actual growth rates in 1988. According to MCI, independent sources indicate that personal income and employment are to remain stable in the NYNEX region in 1989, and NYNEX's cost support even shows a predicted increase in real personal income. MCI says that NYNEX does not explain the predicted decline in growth in demand. MCI contends that demand growth should be at least the same as for 1988. MCI also alleges that Ameritech's 1988 demand growth rates were 11.2 percent in Wisconsin, 14.7 percent in Michigan, and 13.3 percent in Indiana. MCI calculates that Indiana shows only 6 percent growth for 1989, Michigan shows 6.7 percent, and Wisconsin shows 10.3 percent. MCI maintains that TS minute growth should be constant, because personal income will grow more in this region in 1989 than it did in 1988, and employment in the construction and trade industries will be constant.[276]

294. MCI also argues that switched access growth was 20 percent in 1988 for Pacific, but for the first three quarters of 1989 it is predicted to be 10.1 percent. MCI says that economic indicators predict a further upswing in 1989. Therefore, MCI concludes, growth in TS minutes should equal or exceed the growth in 1988, or be at least 23 percent. MCI also observes that although the Southeast has the strongest regional economy in the Nation over the past decade, BellSouth predicts a slowdown in the growth of access lines. MCI says that BellSouth also predicts inadequate growth in TS minutes. MCI contends that the growth should be at least 15 percent, not the 12.2 percent predicted.[277]

b. Replies

295. Ameritech states that its forecasted growths in demand are reasonable given the forecasted changes in price and income. Ameritech also alleges that the historical average growth in minutes of use is 7.7 percent (the multi-year trend, rather than the one year "snapshot" rate used by MCI), while this year's forecasted growth rate is a reasonable 7.1 percent. Ameritech defends its use of price and income as key variables, and contends that real personal income growth rates for the Ameritech states are uniformly lower in 1989 than in 1988. Ameritech disputes several of the citations to economic indicators used by MCI. Finally, Ameritech emphasizes that it is forecasting an increase in switched access minutes, and that merely the growth rates for switched access minute demand will be lower.[278]

296. NYNEX states that its econometric model reflects all appropriate economic and demographic data in its TS MOU forecast, including real price, real income per capita, and population. These are excellent estimators of TS growth, according to NYNEX. NYNEX disputes MCI's ecomonic figures, arguing that declines in real ecomonic growth and declines in IC price reductions account for most of the slow down in TS demand growth in 1989. NYNEX also states that other economic indicators proposed by MCI, such as housing starts and future employment levels, are subsumed in the more general indicators used by NYNEX.[279]

297. BellSouth states that its econometric model employed economic variables which took into account those influences cited by MCI, as well as price fluctuation. BellSouth says that its projected 1989 growth rate of 11.2 percent for traffic sensitive minutes of use is consistent with the expectation of sustained economic growth in the Southeastern region.[280]

298. Bell Atlantic states that IC rate decreases in the range of 12 to 14 percent during 1987 and 1988 produced strong demand stimulation during those years, while the 8.8 percent rate decrease this year leads to lower 1989 growth. Bell Atlantic further states that its econometric model explains 99.8 percent of the variation in TS minutes of use.[281]

299. Pacific states that MCI incorrectly calculated Pacific's 1988 growth in switched access minutes to be 20 percent. Pacific says that in 1988 about 500 million switched access minutes of use were shifted to the interstate jurisdiction because of a change in Pacific's monitoring system, and substantial switched access minutes of use that had previously gone unrecorded were billed on a one-time basis because of a change in the billing system. The normalized actual 1988 growth is estimated by Pacific to have been 12-14 percent.[282]

300. US West states that its growth rates are consistent with economic projections for the region, and claims that MCI has not presented any evidence that US West has not accurately projected its 1989 TS demand quantities.[283]

c. Discussion

301. The Bureau has analyzed the tariff filings, the petitions, and the replies and we are not persuaded that any compelling argument has been presented that changes to or investigation of these demand levels is warranted at this time. To a large extent, the petitioner's allegations are based on a misunderstanding of our action in another proceeding. MCI claims that the Bureau reported interstate switched access minutes to have grown by 13.5 percent, but does not acknowledge that the growth figure cited takes into account all growth since the third quarter of 1984. This period included demand stimulation occasioned by large decreases in interstate rates. Such decreases are not expected to recur in the same magnitude.

302. In other cases, we simply do not agree with MCI that certain declines in growth rates are unreasonable. While the record does indicate that NYNEX is reducing its predicted growth rate from 9.6 percent to 8.5 percent, we do not find this to be significant given that income will not increase at the same rate, nor will interexchange rates decrease as much as last year. Ameritech (Wisconsin) is decreasing its predicted growth rate by less than 1 percent, from 11.2 percent to 10.3 percent. This is likely attributable to the smaller decline in the price of interexchange services. MCI has not supported its conclusion that Pacific's growth rate for 1989 sould be at least 23 percent, or that BellSouth's should be at least 15 percent. Pacific's reply that its normalized growth rate in 1988 was 12-14 percent appears plausible, and BellSouth has actually increased its predicted growth rate over the PYCOS period from 11.4 percent to 12.2 percent.

303. Nor has MCI shown the relevance of employment in the construction and trade industries to switched access demand. MCI has not presented any model demonstrating any historical correlation. Thus, we do not find that changes to or investigation of these demand levels is warranted at this time.

16. Category 2 Cable and Wire Facilities

a. Petition

304. MCI states that Bell Atlantic predicts huge increases in Category 2 Cable and Wire Facilities. MCI argues that these increases are not in line with Bell Atlantic's demand projections. MCI computes increases as high as 90.8 percent in one jurisdiction.[284]

b. Reply

305. Bell Atlantic claims that its projected growth in total (not just Category 2) C&W is reasonable. Bell Atlantic computes its total C&W increases to be 6.80 percent and 5.20 percent for total company and interstate, respectively. Bell Atlantic states that these percentages are appropriate in light of general increases in demand and investment in the region. Bell Atlantic further states that no specific demand data relate to Category 2 C&W, which is used for both switched and special services. Demand for most access services, such as local transport, involves components of several separations categories, as for example both Categories 2 and 3 C&W.[285]

c. Discussion

306. We have reviewed the petition, reply, and available data, and conclude that in the C&P jurisdictions of Washington, D.C., Maryland, and Virginia, Bell Atlantic has overstated its investment in Category 2 Cable and Wire Facilities significantly. As explained in Section V.C.1, *supra*, our analysis has taken into account the increases projected by other LECs, and Bell Atlantic has not adequately explained why its proposed increases should be so inconsistent with other predictions. In addition, we analyzed the projected investment in Category 2 Cable and Wire Facilities made by other LECs. We are ordering appropriate disallowances as detailed in Appendix C.

17. Growth in Projected Costs and Decline in Demand

a. Petition

307. ALC states that Bell Atlantic is predicting negative or slow growth in traffic sensitive (TS) minutes in Washington, D.C., and West Virginia. According to ALC, Bell Atlantic is predicting increases in revenue requirement of 15.35 percent and telephone plant in service of 11.33 percent, while demand is slated to decrease in Washington. ALC further alleges that demand in West Virginia is predicted to grow by only 1.37 percent while the revenue requirement is predicted to increase by 13.4 percent and the telephone plant in service by 11.24 percent.[286]

b. Reply

308. Bell Atlantic does not respond.

c. Discussion

309. We have reviewed the petition and have conducted our own analysis of trends in cost and demand. The disallowances detailed in Appendix C incorporate any anomalous trends we have identified.

D. *Jurisdictional Separations*

1. Interstate Investment in CO-Switching Associated with Access Tandems

a. Petitions

310. AT&T contends that LECs may be overstating their interstate revenue requirements if any of their investment in Central Office-Switching is associated with the use of access tandems for provisioning equal access. AT&T apparently fears that if the LECs do have access tandem investment, they may improperly be allocating that investment under the separations procedures applicable to equal access investment, which assign costs heavily to the interstate jurisdiction. The carrier observes that interstate investment amounts in Central Office-Switching are not categorized in Category 1 (operator systems equipment), 2 (tandem switching equipment), or 3 (local switching equipment), but rather are lumped into one summary amount. Thus, AT&T asks the Commission to order Bell Atlantic, BellSouth, Cincinnati, Nevada, NET, NYT, Pacific, Southwestern, and US West to identify any investment in Central Office-Switching related to access tandems, and to separate those amounts using the prescribed methodology.[287]

b. Replies

311. Bell Atlantic contends that it does not have any Central Office-Switching investment associated with the use of access tandems for provisioning equal access. Bell Atlantic states that its access tandem investment was properly separated based upon Section 36.124 of the Commission's Rules, and that its CO-Switching investment associated with equal access was separated in accordance with Section 36.191.[288] US West and NYT state that they did not include access tandem investment in their 1989 equal access revenue requirement. [289] NET states that in developing its equal access revenue requirement it "did include $2,279,000 of cumulative investment associated with equipping certain SXS electromechanical end offices subtending access tandems with LATA Equal Access System (LEAS) technology."[290] The carrier denies that such assignment is improper, however, claiming that costs related to access tandems with LEAS technology fall within the Commission's definition of initial equal access costs and should be treated as if related to end offices.[291]

312. BellSouth notes that the accounting procedures governing equal access investment prohibit inclusion of access tandem amounts. Therefore, BellSouth asserts, no tandem investment is included in its equal access forecast.[292] Similarly, Nevada, Southwestern, and Cincinnati deny assigning any access tandem investment to equal access.[293] On the other hand, Pacific concedes that it inappropriately included tandem investment costs in its 1989 projection of equal access total plant in service, resulting in an overstatement of $1.7 million in its equal access revenue requirement. Pacific contends that the tandem investment costs should have been allocated to the local transport category, which would have increased the revenue requirement for that category by $1.2 million. Pacific states that since this $0.5 million net interstate revenue requirement overstatement is "relatively small," it has not adjusted its rates to reflect the overstatement.[294]

c. Discussion

313. AT&T's broad assertions regarding potential misallocation of access tandem investment to equal access generally do not provide a sufficient basis to investigate the LEC filings or to require further data submissions. AT&T simply raises the specter of misallocation without any specific allegations, and without any attempt to establish that the carriers' equal access revenue requirements themselves are too high. Thus, with respect to most LECs, AT&T has failed to establish a sufficient nexus between the absence of disaggregated cost support data and potential violations of the Commission's Rules to warrant further inquiry.

314. However, Pacific admits that it inadvertently overstated its interstate equal access revenue requirement by $1.7 million by allocating to the equal access category tandem investment which should have been allocated to local transport. Contrary to Pacific's contention, we do not view this acknowledged overstatement in equal access revenue requirement as "small." Moreover, Pacific has not provided sufficient cost support to justify reallocation of any portion of this overstatement in equal access revenue requirement to other Part 69 elements. Therefore, we direct Pacific to remove $1.7 million in revenue requirement from the equal access element.[295]

2. Interstate Allocation of Account 6620, Customer Operations Expense

a. Petitions

315. AT&T contends that New Jersey has improperly allocated approximately $751,000 of Account 6620 costs to the interstate jurisdiction, resulting in the overstatement of its common line revenue requirement by that amount. In particular, AT&T asserts that the data used in New Jersey's billed user study, on which the separations calculations are based, show more message toll users than local users. According to AT&T, this result is possible only if New Jersey employed the Commission's Part 36 Separations Manual, rather than the Part 67 Manual as ordered in CC Docket No. 80-286.[296]

b. Replies

316. Bell Atlantic does not respond to AT&T's allegation regarding Account 6620 in its reply. However, in errata, filed January 31, 1989, Bell Atlantic amends its COS-6(P) charts for New Jersey to reduce the message toll and telegram user count from 6,115,000 to 2,694,000, and to reduce the exchange user count from 3,189,000 to 2,812,000.[297] Bell Atlantic contends that its COS-6(P) charts, as originally filed, did in fact incorrectly list user counts based upon the Part 36 Separations Manual, and that the errata correct that error. Nevertheless, Bell Atlantic asserts that no revenue requirement error resulted from the initial filing, since "[t]he revised user counts, based upon interim rules, reflect the counts actually used by [New Jersey] in development of its revenue requirements."[298]

c. Discussion

317. In view of Bell Atlantic's insistence that it employed the proper user counts in developing its revenue requirements for New Jersey, and in the absence of concrete evidence to the contrary, we do not disallow its Account 6620 expense. However, we emphasize that proper pleading practice requires that carriers respond in their replies to allegations contained in the petitions. The mere filing of errata may not adequately alert the Bureau or other interested parties to changes in underlying cost support. We may assume the validity of petitioners' claims, unless those claims are properly addressed in replies.

3. Apportionment of COE Category 2 Tandem Switching Investment

a. Petitions

318. AT&T argues that Pennsylvania and NYT have overstated their interstate investment in COE Category 2 Tandem Switching, resulting in the overstatement of their interstate revenue requirements by $0.9 million and $0.8 million, respectively.[299] With respect to Pennsylvania, AT&T claims that Section 36.124(b) of the Commission's Rules requires that any COE Category 2 Tandem Switching investment which is not directly assigned be allocated based on that equipment's relative interstate and state study area minutes of use. AT&T asserts that although none of Pennsylvania's pertinent investment is directly assigned, its apportionment to the interstate jurisdiction

exceeds by more than 3 percent (36.393 percent to 33.1651 percent) the interstate share of study area minutes of use for tandem switching equipment.[300]

319. AT&T contends that NYT has made erroneous adjustments to its COE Categories 2 and 3 in connection with the allocation of investment in common equipment. AT&T explains that common equipment is usually booked to the account of predominant use, but is also used by other accounts and allocated to such accounts in accordance with usage. According to AT&T, NYT should have reduced COE Category 2 and 3 amounts proportionally as a result of spreading COE Switching common equipment to other accounts, but instead took the entire reduction from Category 3.[301]

b. Replies

320. Bell Atlantic denies that Pennsylvania overstated its interstate investment in COE Category 2 Tandem Switching. Bell Atlantic contends that AT&T reached its conclusion due to minute of use data that were incorrectly reported in Bell Atlantic's December 30, 1988, access tariff filing. The carrier insists, however, that the correct data were used in allocating Pennsylvania's tandem switching investment, and that the reporting error has itself been corrected in an errata filing.[302] NYNEX also disputes AT&T's contention that it has overstated its interstate investment in COE Category 2 Tandem Switching. NYNEX states that although the manner in which it allocated common equipment from the Part 32 accounts to the Part 36 categories may have "misled" AT&T, in fact the common equipment investment was properly allocated among COE Categories 1 through 4.[303]

c. Errata Comments

321. In its comments on the Bell Atlantic errata, AT&T states that Bell Atlantic corrected the interstate minutes of use figure used to allocate Pennsylvania's Category 2 Tandem Switching investment by including total interstate minutes of use, rather than just interstate access minutes. AT&T asserts that the inclusion of these additional interstate minutes of use accounts for the level of Pennsylvania's initial allocation of COE Category 2 Tandem Switching investment to the interstate jurisdiction, which AT&T had questioned in its petition. However, AT&T contends the revised minute of use figures demonstrate that Pennsylvania has overallocated tandem switching investment to the access (local transport) category, and underallocated such investment to non-access, which recovers the cost of Pennsylvania's corridor traffic.

322. AT&T argues that such investment should be allocated between the access and non-access categories based upon relative minutes of use, but that while Pennsylvania's interstate non-access minutes constitute 13.27 percent of its total interstate minutes, Pennsylvania has assigned only 5.84 percent of its tandem switching investment to the non-access category. According to AT&T, this alleged misallocation results in approximately $2.0 million in excess investment assigned to the local transport rate element, and a $500,000 overstatement of the local transport revenue requirement.[304]

d. Discussion

323. We have reviewed Bell Atlantic's errata filing regarding Pennsylvania's interstate minutes of use associated with COE Category 2 Tandem Switching investment. We conclude, as AT&T suggests in its errata comments, that while Pennsylvania's total interstate allocation of tandem switching investment appears reasonable, Pennsylvania has overstated such investment related to access (local transport), and has understated such investment with respect to the non-access (interexchange) element. Part 69 of the Commission's Rules requires carriers to allocate access-related tandem switching investment to the local transport element, and to allocate all other such investment to the interexchange category.[305]

324. However, the revised minute of use data for Pennsylvania, which show over 13 percent of interstate minutes to be associated with non-access, suggest that Pennsylvania's unexplained allocation of only 5.84 percent of its tandem switching investment to non-access is not in compliance with those rules. If Pennsylvania had allocated tandem switching investment to the access and non-access categories in proportion to minutes of use associated with each, Pennsylania's COE Category 2 Tandem Switching investment related to local transport would have been reduced by $1.96 million, and its revenue requirement for local transport would have been reduced by $498,000. Therefore, we require Pennsylvania to remove $498,000 from its local transport access element revenue requirement.[306]

325. We have also reviewed NYT's COS-6(P) submission (page 2 line 21 and page 3 line 51). Based upon that review, it appears that NYT assigned the COE-related common equipment in accordance with the Commission's Part 36 Rules. Moreover, we are unable to determine how AT&T calculated the $1.8 million overstatement in interstate investment that it alleges in its petition. Therefore, we are not persuaded that any compelling argument has been presented that disallowance or investigation of this investment is currently warranted.

4. US West Allocations of Account 6362 Expenses to Interstate Jurisdiction

a. Petitions

326. AT&T contends that US West has overstated its Account 6362 (Other Terminal Equipment) interstate expense by more than $3.79 million. AT&T states that Section 36.331(b) of the Commission's Rules requires that "[t]hese expenses shall be apportioned between state and interstate operations in accordance with the apportionment of related investment." This "related investment," according to AT&T, is Account 2362 Other Terminal Equipment, which must be quantified and allocated between Category 1 and Category 2, before Account 6362 expense can be apportioned between the state and interstate jurisdictions. This allocation of Account 2362 investment between Categories 1 and 2 is important, AT&T argues, because under Section 36.142(b) of the Commission's Rules all Category 2 Account 6362 (CPE) expense, calculated based upon Category 2 Account 2362, is directly assigned to the intrastate jurisdiction.

327. AT&T states that US West has not directly provided Account 2362 Category 1 and 2 amounts in its filings, so AT&T has attempted to reconstruct these amounts from US West's filed figures on Information Origination/Termination investments. Based upon this reconstruction, AT&T concludes that US West has underallocated expense to Account 6362 Category 2

(CPE), which is directly assignable to intrastate activities, and overallocated expense to Category 2 of that account, which is allocated in part to interstate activities.[307]

b. Replies

328. US West denies AT&T's contention that it has overstated its Account 6362 interstate expense. US West contends that the overallocation calculated by AT&T was based upon COS-7(P) subaccount data. According to US West, these data were based upon historical subaccount distributions, were not intended to represent projected 1989 allocations, and therefore may result in invalid calculations. In particular, US West argues that the 1989 COS-7(P) subaccount levels AT&T relied upon for Information Origination/Termination (IOT) in five of US West's six study areas were based upon 1988 historical distribution ratios that did not account for the removal of fully amortized inside wire effective January 1, 1989. The carrier contends that it will seek permission to correct its COS-7(P) charts at a later date, but contends that since it did not base its Account 6362 allocations on those charts those distortions did not result in any revenue requirement error.[308]

c. Discussion

329. We agree with AT&T that some portion of US West's expense should be assigned to Account 6362 Category 2 (CPE), and thus directly assigned to the intrastate jurisdiction. According to Part 36 of the Commission's Rules, carriers are required to segregate expenses charged to Account 6362 (Other Terminal Equipment) into two categories. Category 1 includes expenses associated with IOT equipment, and Category 2 includes expenses related to CPE.[309] Similarly, the Rules require that Other Terminal Equipment investment be charged to two corresponding categories within Account 2362. The Rules provide that allocation of Category 1 *expenses* between the intrastate and interstate jurisdictions must be made in proportion to related *investment*, while Category 2 expenses are directly assigned to the intrastate jurisdiction.[310]

330. As AT&T notes in its petition, US West submitted data for its Arizona study area that show the following projected investment for Account 2362 (Other Terminal Equipment):[311]

Category 1	$57,813,000
Category 2	$ 5,592,000
Total	$63,405,000.

US West's data for Arizona also show the following projected maintenance expenses in Account 6362:

Category 1	$ 10,339,000
Category 2	- 0 -
Total	$ 10,339,000.

As illustrated by these expense and investment figures for Arizona, we believe it is not reasonable that US West can report almost 10 percent of its investment in Account 2362 Category 2, but show no maintenance expense associated with that investment. Moreover, we do not accept US West's argument that the IOT costs it submitted in COS-7(P) are inaccurate due to the failure to account for fully amortized inside wire. The amortization of inside wire should have no impact on these accounts, because the investment in inside wire that is to be amortized is recorded in Account 2321 (Customer Premises Wiring), and is amortized to Account 6561 (Depreciation Expense -- Telecommuncations).

331. We believe AT&T's method of calculating the amount of Account 6362 expense that should be removed from US West's interstate costs is reasonable. Therefore, we disallow $3.79 million of US West's Account 6362 interstate expense, and direct the carrier to adjust its interstate rates to reflect the removal of such expense.[312]

5. Calculation of Transitional Subscriber Plant Factor

a. Petitions

332. AT&T contends that GTOC has miscalculated its transitional subscriber plant factors (SPFs) for Oregon, New Mexico, and Hawaii, resulting in about $1.3 million in overstated interstate revenue requirement.[313] MCI levels essentially the same criticism against the GTOC SPFs in these three states, and estimates the interstate revenue requirement overstatement to be approximately $1.5 million.[314]

b. Replies

333. GTOC disputes the contentions of AT&T and MCI. GTOC explains that AT&T and MCI based their calculations on frozen SPF levels obtained from a monitoring report prepared by the Joint Board staff.[315] According to GTOC, the Joint Board itself indicated that the data underlying that report were intended to be used for analytical purposes only and were not entirely accurate.[316] GTOC asserts that the proper frozen SPF levels used in calculating the 1989 transitional SPFs are those stated in its October 1987 annual access tariff filing, and that these are the data underlying its current tariff filing.[317]

c. Discussion

334. We have reviewed GTOC's SPF factors for the Oregon, New Mexico, and Hawaii study areas, and have compared them with SPF factors calculated from data submitted to the Joint Board in Docket 80-286. We conclude that GTOC has submitted the proper SPF factors in its cost support data. Therefore, we are not persuaded that any compelling argument has been presented that disallowance or investigation of these factors is warranted at this time.

6. Apportionment of Other State and Local Taxes

a. Petitions

335. AT&T claims that Bell Atlantic has overstated the amount of Other State and Local Taxes included in its interstate revenue requirement. In Washington, D.C., and New Jersey, AT&T argues that Bell Atlantic did not follow the Commission's requirement that other state and local taxes be apportioned according to Telecommunications Plant in Service. As a result, AT&T calculates that Bell Atlantic has improperly included approximately $2.3 million in its interstate revenue requirement.[318]

b. Replies

336. Bell Atlantic replies that for the District of Columbia, AT&T improperly included Sales and Use Taxes in Other State and Local Taxes, when the D.C. Sales and Use Taxes are directly assigned. Thus, in the District, only property taxes are apportioned based on Telecommunications Plant in Service. When this is taken into account, Bell Atlantic claims that the interstate apportionment for the District is correct. With respect to New Jersey, Bell Atlantic argues that one part of Other State and Local Taxes, equal access related property taxes, is not apportioned based on total Telecommunications Plant in Service. Bell Atlantic apportioned equal access related property taxes on the basis of equal access Account 2001. Although Bell Atlantic admits a minor error in its calculation of the interstate amount for New Jersey, Bell Atlantic states that this error is less than 1 percent.[319]

c. Discussion

337. Section 36.412(c) of the Commission's Rules requires carriers to use direct assignment for these expenses where possible and to allocate the remaining expenses on the basis of telecommunications plant in service, Account 2001. We believe that Bell Atlantic is correct in its assignment of other state and local taxes for C&P of the District. We also find, however, that Bell Atlantic has assigned excess taxes to the interstate jurisdiction for New Jersey. Items assigned to the equal access category must comply with Section 36.421(a) of the Commission's Rules, which defines equal access expenses. Bell Atlantic has not persuaded us that these taxes are equal access expenses. Because Bell Atlantic used an equal access interstate allocation percentage of 84.33 for the supposed equal access related taxes, and these taxes should have been subject to the 29.01 percent allocator used for all other state and local taxes, we disallow the difference plus the amount of Bell Atlantic's other error. As shown in Appendix E, this equals a disallowance of $562,000 of other state and local taxes for the equal access element for Bell Atlantic.

7. Assignment of Category 4.23 Central Office Equipment (COE) Costs to Interstate Jurisdiction

a. Petitions

338. AT&T states that the Commission's rules require that costs be directly assigned wherever possible, and then that the remaining jointly used Category 4.23 investment be allocated based on conversation minutes. AT&T claims that several LECs in separating Category 4.23 message investment failed first to remove such investment that was previously directly assigned. AT&T alleges that Bell Atlantic, GTOC (Virginia, Michigan), NYNEX, and Pacific increased their actual 1988 interstate assignments of Category 4.23 message investment substantially over 1987 actuals, demonstrating that the Category 4.23 message investment that was directly assigned had not been removed. AT&T maintains that these LECs then used these overstated results as a basis for their 1989 forecasts. AT&T argues that these LECs in the aggregate appear to have overassigned more than $259 million to interstate for 1989, resulting in overstated revenue requirements of nearly $65 million. In particular, AT&T states that NYT overstated its interstate revenue requirement by approximately $15 million by using an inflated conversation minute factor that contradicts its direct case in Docket 88-1, Phase II.[320]

339. Ad Hoc contends that Bell Atlantic has filed conflicting data in this proceeding and in Docket 88-1, Phase II. First, of all Bell Atlantic's jurisdictions, only the District of Columbia shows a massive increase (600 percent) in its count of interstate private line interexchange terminations. Three Bell Atlantic companies show increases of more than 100 percent in their 1988 counts of joint message interexchange terminations be-

tween the 1988 data submitted in Docket 88-1, Phase II, and the historical 1988 data submitted here, while two show decreases of 43 percent while showing substantial increases in their counts of private line interexchange terminations between their filing here and their submission in Docket 88-1, Phase II.

340. In contrast, the remaining interstate private line interexchange termination counts show rough consistency between the Docket 88-1, Phase II, data and the data before us here. Ad Hoc also explains that separations changes have been made by the Commission that should decrease the count of 1988 interstate private line interexchange terminations. Ad Hoc also demonstrates that the Bell Atlantic companies showing large increases in joint message exchange termination counts show large increases in joint message investment levels, except for Virginia and West Virginia, where there are decreases in joint message investment relative to interstate private line investment. Moreover, Ad Hoc claims that the investment allocations between joint message and interstate private line do not reflect the relative quantities of these terminations. Ad Hoc concludes that interstate private line is bearing a disproportionate share of category 4.23 COE investment.[321]

b. Replies

341. Bell Atlantic replies that AT&T has not made an accurate comparison of its 1987 and 1988 interstate ratios. Bell Atlantic argues that the 1987 ratio used by AT&T represents the interstate percent of total Category 4.23 message investment, while the 1988 ratio to which it is compared represents only the ratio of Category 4.23 joint message investment. Bell Atlantic also takes issue with the method by which AT&T forecasted Bell Atlantic's 1989 conversation minutes, saying, for example, that AT&T did not take into account the conversation minutes associated with interexchange carriers other than AT&T. However, Bell Atlantic did not provide the Commission with a recalculation of the correct 1987 ratios, but merely presented data to show that the 1988 actual ratios were consistent with the 1989 ratios. Bell Atlantic argues further that Ad Hoc has incorrectly calculated the ratios it used to conclude that investment allocations between joint message and interstate private line do not reflect the relative quantities of these terminations. Bell Atlantic claims that Ad Hoc compared total joint message terminations with only interstate joint message investment. Bell Atlantic displays a new table showing that the ratios are consistent between ternminations and investment. Bell Atlantic does not explain the substantial changes in termination counts questioned by Ad Hoc.[322]

342. GTOC replies that total interexchange conversation minutes were properly used to develop the conversation minute factor for all study areas. In Virginia, GTOC states that there was a major network reconfiguration that fully accounts for the change in the Virginia conversation minute factor. A change in network configuation can cause a shift in circuits from interexchange to intraexchange, changing the proportion of direct assigned message interstate and message joint circuits from the 1987 data to the 1989 projection. In Virginia in 1988 the AT&T POP was relocated and a new basic holding time study was performed. As a result, intrastate interLATA conversation minutes decreased. Claiming that it cannot replicate the entries in AT&T's charts, GTOC instead provides actual historical conversation minute factors by month from January through September 1988 to confirm that historical conversation minute factors are consistent with those used to develop the 1989 test year interstate investment allocation.[323]

343. NYNEX replies that Section 36.126(e)(3)(i) of the Commission's Rules allows the LECs to use conversation minute factors to allocate all Category 4.23 message costs and that Section 36.1(c) does not require them to assign any of these costs directly.[324] Under Section 36.126(e)(3)(i), NYNEX states that it included all message investment in COE Category 4.23, both investment that customers use exclusively for either state or interstate message services and investment that customers use jointly for state and interstate message services, in a single category that was allocated based on conversation minutes. NYNEX states that the history of the Commission's adoption of the new Part 36 Rules supports NYNEX's interpretation of the Rules, and contradicts AT&T's allegations. NYNEX says that contrary findings in Docket 88-1, Phase II, are currently the subject of a petition for reconsideration filed by NYNEX.[325]

344. Finally, NYNEX disputes AT&T's statement that NYT used an inflated conversation minute factor that contradicts its direct case in Docket 88-1, Phase II. NYNEX states that in its rebuttal case in Docket 88-1, Phase II, NYNEX admitted that in its direct case it had failed to include conversation minutes associated with message circuit investment that had previously been directly assigned. It revised its calculations of conversation minutes in its monthly separations procedures, which calculations are now consistent with the conversation minute factor used for the 1989 access tariffs. Therefore, NYNEX claims, there is no disparity between the factors reported in Docket 88-1 and in this proceeding.[326]

345. Pacific states that separations rules for Category 4.23 costs are not the same in 1989 as they were in 1987. Pacific says that direct assignment was not the principal cause for the shift in costs to the interstate jurisdiction. Rather, the effect of Part 36, which separated message and private line between jurisdictions on the basis of circuit terminations instead of circuit miles, accounted for the shift in costs. Pacific argues that it correctly applied these new separations rules in 1988 and 1989. Pacific also states that its conversation minute factor is correct and includes all usage of joint interexchange circuit equipment, including usage of message circuit miles that in 1987 were dedicated to the interstate or intrastate jurisdictions. Pacific also argues that the unique characteristics of its serving area (*i.e.*, that average length of haul is substantially longer for intrastate than interstate traffic) caused a larger allocation to interstate when the allocator changed form minute-miles to minutes only. Also, Pacific states that on April 1, 1989, intermediate terminations will cease to be counted for separations. This will cause a 32.3 percent decrease in special access, and a 11.36 percent increase in interstate transport.[327]

c. Discussion

346. The Bureau has reviewed the tariff filings, the petitions, and the replies, and we find that the LECs' forecasts of interstate Category 4.23 investment appear to be reasonably accurate. We also find that to a large extent AT&T's allegations are based on a misunderstanding of the Commission's action in another docket. The discussion of disallowances of Category 4.23 investment in Docket 88-1 noted that certain carriers reported conversa-

tion minute mile (CMM) factors for 1987 that were almost identical to the conversation minute (CM) factors reported for 1988. The Commission found that these factors should not have been similar, and that the interstate factor should have been lower in 1988. In 1987, the directly assigned state message investment was significantly higher than the directly assigned interstate message investment. Therefore, in 1988 when the formerly directly assigned message investment was consolidated into one joint message category, the state CM factor should have reflected a higher proportionate percentage of the total usage than reported by the carriers. The Commission did not have accurate 1988 data for these carriers, and accordingly calculated disallowances using the carriers' 1987 investment data.

347. We have conducted our own test of the accuracy of the carriers' 1989 projections for this investment, using the data submitted regarding this investment in the Docket 80-286 Joint Board proceeding. In that proceeding, the carriers assigned Category 4.23 investment to the Category 4.23 subcategories on the basis of termination counts, excluding intermediate terminations, as required by Part 36 of the Commission's Rules. Our analysis shows that all carriers appear to have accurately assigned this investment to the appropriate subcategories. Therefore, we are not persuaded that any compelling arguments have been presented that disallowances or investigation of this factor is warranted at this time.

8. NYT Special Access Separations Counts

a. Petitions

348. Ad Hoc contends that NYT has provided separations counts here that are inconsistent with the values provided in Docket 88-1, Phase II. In that proceeding, Ad Hoc says that NYT reported 59,711 interstate private line interexchange terminations in 1988, including end and intermediate terminations. NYT now claims, according to Ad Hoc, that its interstate private line interexchange terminations count for 1988 was 87,387 -- 46 percent higher. In addition, Ad Hoc states that this only reflects end terminations. The number should be lower without intermediate counts, as other carriers demonstrate. This inflated 1988 count leads to an inflated 1989 projection, especially in light of decreasing special access demand.[328]

b. Replies

349. NYT replies that it reported an incorrect circuit termination count for interstate private lines in Docket 88-1, a count that removed digital terminations twice. NYT had taken the results of a BellCore computer program to count circuit terminations, and from that total count had deducted its quantity of digital terminations. NYT later learned that the BellCore result had already eliminated digital termination counts. NYT then recalculated all interexchange circuit terminations retroactively to January 1, 1988, and reported the correct numbers here. NYT's 1989 forecast thus declines from the new corrected 1988 actuals because of the decline in special access demand and the elimination of intermediate terminations.[329]

c. Discussion

350. We reviewed the termination counts provided by NYNEX in Docket 88-1 and compared those counts with termination counts submitted in its 1989 cost support. We believe that NYNEX has provided a reasonable explanation for the change in termination counts. Therefore, we are not persuaded that any compelling arguments have been presented that disallowances or investigation of the NYNEX termination count is warranted at this time.

9. Ameritech Interstate Private Line Subscriber Loop Counts

a. Petition

351. Ad Hoc argues that in this proceeding Ameritech has submitted interstate private line subscriber loop counts for April through June 1988 that are 23 to 30 percent lower than the 1988 counts provided in Docket 88-1, Phase II, while its counts of jointly used message subscriber loops show only minor differences. Also, despite declining demand, Ad Hoc alleges that Ameritech's 1989 counts remain higher than its 1987 counts. Ad Hoc surmises that Ameritech is inflating its total interstate private line revenue requirements by treating voice grade channels derivable from high capacity channels as physical loops. Ad Hoc observes that the more costs a carrier can load onto voice grade service, the more flexibility it has to set high capacity rates strategically. Ad Hoc also states that Ameritech is one of only a small number of carriers proposing significant increases in voice grade rates. In addition, Ad Hoc argues that because there is very little rate activity at the state level at this time, it behooves a carrier to move as much cost as possible into the interstate jurisdiction.[330]

b. Reply

352. Ameritech responds that Ad Hoc's data are erroneous. Ameritech states that corrected 1988 prospective loop count data were submitted in Docket 88-1, Phase II. Ameritech also claims that it has discovered that the 1987 data filed in Docket 88-1, Phase II, were in error because they did not include WATS loops, which were included in 1988 and 1989 data. Using these new data, Ameritech argues that the actual 1988 counts reveal only a modest decrease from the 1988 projections in Docket 88-1. Moreover, Ameritech demonstrates that 1989 projections are lower than the 1987 actuals when corrected for the inclusion of WATS loops. Ameritech also maintains that a direct correlation between ratemaking demand and separations loop counts need not exist, because one local distribution channel is counted for ratemaking demand purposes -- even when no loop exists -- because the customer premise and the serving wire center are in the same building.[331]

c. Discussion

353. We have reviewed the tariff filings, Ad Hoc's petition and Ameritech's reply, and find that no compelling arguments have been presented that disallowances or investigation of Ameritech's loop count is warranted at this time. Ameritech's reply appears adequately to address Ad Hoc's contentions. The omission of WATS loops from the count of 1987 special access loops would cause the count of directly assigned loops for that year to be understated.

10. Allocation of Jointly Used COE Category 4.12 Exchange Trunk Circuit Equipment

a. Petitions

354. AT&T alleges that Bell Atlantic in New Jersey, Pennsylvania, and Delaware has misallocated jointly used COE Category 4.12 Exchange Trunk Circuit Equipment, resulting in an overallocation of investment to interstate by $97.4 million, and an interstate revenue requirement overstatement of $38.6 million. AT&T states that Section 36.126(c)(2) requires that this equipment be allocated between jurisdictions the same as related Exchange Trunk Cable and Wire Facilities (C&WF). Section 36.155(a) requires that C&WF not directly assigned be allocated between jurisdictions based on relative minutes of use, according to AT&T. AT&T therefore states that the minutes of use factor used to separate the C&WF should approximate the minutes of use factor used for the COE Category 4.12 Exchange Trunk Circuit Equipment. In New Jersey, Pennsylvania, and Delaware, however, the latter minutes of use allocation factor is more than twice the factor used with C&WF.[332]

b. Replies

355. Bell Atlantic replies that this problem was corrected in its January 31 errata filing. Bell Atlantic explains that the inclusion of private line interstate and state trunk investment in joint message was overlooked in both investment groups for Pennsylvania and Delaware. In the errata, Bell Atlantic corrected C&WF minutes of use for these states. In New Jersey, joint message failed to reflect directly assigned message state investment. The C&WF minutes of use were revised to correct the error.[333]

c. Errata Comments

356. AT&T argues that in its errata filing, Bell Atlantic has projected a 23 percent increase in its investment in special access trunk Cable and Wire Facilities and Special Access Exchange and Interexchange Circuit equipment while projecting a 34 percent reduction in the demand for special access. AT&T further argues that this results in Bell Atlantic's assigning an excess $100.1 million to the interstate jurisdiction.[334] Thus, AT&T concludes that Bell Atlantic has corrected its initial misallocation of jointly used Category 4.12 central office equipment by improperly shifting these costs and Cable and Wire Facilities costs to the interstate private line category.

d. Discussion

357. We have reviewed the tariff filing and the related pleadings. The Bell Atlantic erratum appears to address the errors initially noted by AT&T. However, we have reviewed AT&T's errata arguments and believe that it has raised an additional valid concern. Bell Atlantic has not provided an explanation for the apparent inconsistency between its low special access demand data and its increased projection of special access investment. Therefore, we believe that Bell Atlantic should remove the effect of the excess investment calculated by AT&T from its 1989 special access revenue requirement.

358. We do not agree, however, with AT&T's estimate of the revenue requirement impact of Bell Atlantic's overstated special access investment. In translating the investment disallowance into a revenue requirement amount, AT&T used a factor that reflected changes in the return on the investment, depreciation on the investment, federal income taxes, total operating expenses, uncollectible revenues, and other taxes. We do not believe that there is evidence that Bell Atlantic's projections of total operating expenses, uncollectible revenues, or other taxes need revision. Therefore, we have used a lower revenue requirement factor that reflects only return on investment, depreciation, and federal income taxes. Using this factor, the disallowance for Bell Atlantic's Special Access revenue requirement is $43.032 million, as shown in Appendix E.

11. Allocation of Local Business Office Expenses to Subscriber Line Charge Billing

a. Petitions

359. AT&T states that several LECs have misallocated certain Local Business Office (LBO) expenses to subscriber line charge billing, causing an overstatement in the Carrier Common Line (CCL) revenue requirement of more than $30 million. AT&T explains that Part 36 governs the allocation of costs to subscriber line charge billing, and then Part 69 assigns all the subscriber line charge billing costs to the common line revenue requirement. AT&T claims that Bell Atlantic (New Jersey, Pennsylvania) and Pacific report subscriber line charge billing costs more than 250 percent above those reported by other BOCs without explanation. AT&T maintains that because subscriber line charge billing costs represent the costs associated with billing the subscriber line charge to the end user, the subscriber line charge billing costs per access line should not vary significantly among BOCs. The average cost per access line of these three BOCs is between 278 percent and 450 percent above the average subscriber line charge billing cost of the remaining BOCs. AT&T calculates that Pacific's subscriber line charge billing expense should be decreased by $14.1 million and Bell Atlantic should reduce the subscriber line charge billing costs in New Jersey and Pennsylvania by $5.8 million and $10.4 million, respectively.[335]

b. Replies

360. Bell Atlantic states that the amount of LBO expense assigned to common line related to subscriber line charge billing is reasonable in light of the higher level of activity expected in connection with the 1989 subscriber line charge increases. The amounts associated with collecting payments from end users and responding to bill inquiries are $46.5 million for New Jersey and $42.7 million for Pennsylvania, of which 14 percent and 21 percent, respectively, are assigned to the subscriber line charge billing element. Bell Atlantic further claims that because the subscriber line charge represents one of four major categories of service billing handled by the LBO, basic exchange service, interstate subscriber line charge, intrastate message toll and interstate message toll, these percentages are reasonable.[336]

361. Pacific responds that it assigns all expenses associated with inquiries relating to the subscriber line charge to the common line element as required by Sections 36.377 and 69.406(4) of the Commission's Rules. Pacific states that in its territory the subscriber line charge makes up a larger part of a residential customer's bill because Pacific's basic residential rate is only $8.35, while the subscriber line charge is scheduled to increase to $3.50 on April 1, 1989. Pacific also states that it performed a study

of end user billing inquiry costs, and found that end users frequently questioned the subscriber line charge charges appearing on their bills. Based on that study, Pacific states that it should be no surprise that its end user billing inquiry costs were projected to be higher than the industry average.[337]

c. Discussion

362. We have reviewed the tariff filings, petitions, and replies and are not persuaded that either Bell Atlantic or Pacific has adequately justified the level of these allocations. While we are aware of studies that demonstrate that the level of billing inquiries regarding the subscriber line charge was significant immediately after the subscriber line charge was initiated, the level of inquiries decreased thereafter. The carriers have not filed any evidence that a significant level of inquiries occurs again every time the subscriber line charge increases. To the contrary, we would expect that once end users have been instructed as to the purpose of the subscriber line charge and that it will increase over time, they would not need to inquire again. Moreover, even if an increase in subscriber line charge inquiries does occur at the time the subscriber line charge is increased, these carriers have not explained why the cost of these additional inquiries would be extraordinarily higher in their regions than elsewhere in the Nation.

363. Pacific has not presented any evidence that the level of its basic residential rate has any impact on the level of subscriber line charge inquiries. In fact, although Pacific does have a relatively low basic residential rate, its customers spend well over the national average on their total telephone bill, rendering Pacific's argument moot.[338] In addition, Pacific has not presented us with its study of end user billing inquiry costs. Without knowing whether the study was performed shortly after the implementation of the subscriber line charge or more recently, its usefulness is questionable. As noted above, the level of subscriber line charge inquiries was higher shortly after implementation, but decreased thereafter.

364. Thus, we conclude that these carriers have used faulty information and, based on that, have overallocated local business office expenses to the subscriber line charge billing inquiry category. We therefore disallow from Pacific's CCL revenue requirement $14.1 million, and from Bell Atlantic's New Jersey and Pennsylvania CCL revenue requirements $5.8 million and $10.4 million, respectively, as shown in Appendix E.

12. Overstated Assignment of Category 2 Customer Services Expenses to Common Line

a. Introduction

365. Our analysis of the data submitted in the 1989 tariff filings indicates that some carriers have assigned excessive costs to the Common Line rate element. We therefore are directing disallowances for all companies which have misassigned more than $100,000 to the Common Line rate element.

b. Discussion

366. Costs incurred for establishing and servicing customer accounts under Part 36 are assigned to one of three categories: (1) Local Business Office Expense; (2) Customer Service (Revenue Accounting); or (3) All Other Customer Service Expense. Expenses in the three categories are further assigned to appropriate subcategories for jurisdictional separations. For Category 2, Customer Service, there are three subcategories: (1) Message Processing expense; (2) Other Billing and Collecting expense; and (3) Carrier Access Charge Billing and Collecting Expense. The only portion of Category 2 that is recovered from the Common Line rate element, under Part 69, is the part of the Other Billing and Collection subcategory attributable to subscriber line charge billing.

367. The LECs provided data, in their COS-8 reports, for the Other Billing and Collection subcategory of Category 2 that appear to be generally incorrect and incomplete. We were, however, able to use the total Category 2 data for our analysis of the assignment of costs to the Common Line rate element with data received in the revenue accounting phase of the ongoing Docket 80-286 Joint Board proceeding.[339] The Joint Board data indicate that 60 percent of Category 2 costs are attributable to the Other Billing and Collection subcategory, and that most of the respondents, including BellSouth, NYNEX, Pacific, and USTA, generally agreed that 5 percent of the Other Billing and Collection subcategory represents the costs incurred for subscriber line charge billing and collection. Also, Southern New England Telephone and MCI suggested a method that would yield substantially less than 5 percent.

368. We analyzed the Category 2 data from all the Tier 1 carriers that submitted data in the COS-8 report. Our analysis assumed that 60 percent of the Category 2 data is attributable to Other Billing and Collection Expense and that 5 percent of Other Billing and Collection Expense is attributable to expenses incurred in billing and collection relating to the subscriber line charge and is therefore assigned to the Common Line rate element. We have found that 25 carriers have overassigned Other Billing and Collection Expense to the Common Line rate by more than $100,000. We therefore require that, for those 25 carriers, the amount exceeding our calculated amount be disallowed for purposes of computing a Common Line revenue requirement, as detailed in Appendix E.[340]

13. Ameritech Composite Allocator

369. As part of the 1987 revision of the Separations Manual and its codification as Part 36 of the Commission's Rules,[341] the Commission determined to alter the basis for apportionment of local switching equipment between the jurisdictions. The *Part 36 Order* also recast the categories of switching costs; the focus here is on COE Category 3 equipment, which includes basic switching train; toll connecting trunk equipment; interlocal trunks; equipment used for identification, recording, and timing of customer dialed charge traffic as well as switched private line traffic; and switching equipment for special services.

370. The previous Separations Manual's reliance on investment as the basis for allocation of costs associated with this equipment is to be supplanted by reliance on relative dial equipment minutes of use (DEM), effective January 1, 1993. Rather than effecting this change on a flash-cut basis, it is to be implemented gradually over the 1988-1992 period, by a transitional mechanism specified in Section 36.125 of the Commission's Rules, 47 C.F.R. § 36.125. The mechanism employs two component allocators, one based on investment and the other on DEM, and by prescribed factors accords them distinct

proportional weight, with increasing reliance on the DEM allocator in successive years. The other component allocator used in the transition, the "composite allocator," is determined by calculating the ratio of combined interstate COE (aggregated from several former COE categories) to combined COE for all jurisdictions (using the same former COE categories). This ratio is calculated on the basis of separations account balances as of December 31, 1987, and does not vary thereafter.

371. Successive Illinois Bell filings have, however, varied the composite allocator significantly, and so far without satisfactory explanation. In the 1988 annual filing, Ameritech relied on a composite allocator of 0.175346, but changed it without satisfactory explanation to 0.199544 for the rates submitted under Transmittal No. 206. The Description and Justification for that transmittal, the first prepared on the basis of actual year-end 1987 data, stated only that "projections of the composite allocator . . . differed significantly from actuals."[342] This question was designated for investigation, but Ameritech elected not to file a direct case explaining the computation of this factor.[343]

372. While it is to be expected that actual experience would not precisely accord with projections of COE investment, the projections in the 1988 annual filing relied on actual data from a substantial portion of calendar year 1987, and Ameritech then failed to explain the dramatic divergence in Transmittal No. 206 from these projections. Nor did the substantial variation evident in this filing end the matter. The instant annual filing further modified the composite allocator to 0.205814.[344]

373. In view of the absence of any satisfactory explanation, we are disallowing the revenue requirement that does not reflect the use of a composite allocator of 0.175346. Recalculating the transitional factor for this adjustment, we find that the transitional factor should be 0.165043, instead of 0.186371, resulting in a disallowance of $33,426,000 of Illinois Bell COE Category 3 gross investment as shown on COS 8(P). Adjusting this investment for the local switching depreciation reserve factor of 0.3363[345] and taxes at the statutory rate, we disallow $4,033,000 in revenue requirement from local switching. *See* Appendix E.

14. Southwestern Revised Loop and Mileage Counts

a. Comments

374. MCI argues that, in its errata filing, Southwestern has reduced its number of message joint loops and its mileage counts. MCI states that a reduction in the number of loops should produce a decrease in projected investment. MCI says that this failure to reduce investment results in smaller allocations to intrastate and interstate message, and a larger allocation to interstate private line, with a net increase in allocation to interstate of approximately $1 million.[346]

b. Discussion

375. MCI has failed to provide any evidence that Southwestern's error in loop and mileage projections caused an error in investment projections. Because the information concerning loop counts and mileage counts comes from different sources than the investment data, Southwestern could have made an error in projecting its loop or mileage counts without making an error in projecting its related investment. Finally, even if Southwestern failed to revise its investment related to the loop or mileage counts, the small revisions it made in its loop and mileage counts would have an insignificant impact on Southwestern's interstate revenue requirements and no impact on its access rates. Therefore, we do not believe that MCI has provided sufficient information to warrant any disallowance or investigation.

15. Southwestern Terminating Switched Access Demand

a. Comments

376. AT&T argues that Southwestern is projecting too few interstate terminating minutes. AT&T alleges that if these minutes are projected too low, it will result in a per minute local switching charge that is too high. AT&T argues that based on its records, AT&T is terminating more interstate minutes in Southwestern's region than Southwestern is projecting.[347]

b. Discussion

377. AT&T fails to show its projected terminating minutes or how its estimates compare with Southwestern's projections. In fact, AT&T has failed to provide any convincing data or studies to support its position. Therefore, we believe that no compelling argument has been raised that disallowances or investigation of this issue is warranted.

E. *Part 69 Access Rules*

1. Access Revenue Requirement for Local Business Office -- Carrier Access Billing System Expenses

a. Petitions

378. AT&T contends that Ameritech (Illinois) and Bell Atlantic (New Jersey) have overstated their Local Business Office -- Carrier Access Billing System (CABS) expenses by $10.0 million and $7.8 million, respectively, leading to an overstatement in these LECs' access revenue requirements of approximately $17.8 million. AT&T asserts that these figures, relative to their respective total access revenue amounts, are more than 50 percent higher than the average CABS expenses of the other BOCs for which data are available.[348]

b. Replies

379. Ameritech responds that its CABS expenses were calculated by following Commission rules and reasonable ratemaking procedures. Ameritech questions whether AT&T's "average" concept is an appropriate analytical tool but notes that even if such a concept were appropriate AT&T's comparisons are invalid. According to Ameritech, AT&T based its averages on an incorrect CABS revenue requirement of $16.6 million for Illinois Bell rather than the correct figure of $14.7 million. Ameritech concludes that this error mars AT&T's analysis as applied to Ameritech and raises doubts about similar errors throughout AT&T's "average" analysis of other carriers. Ameritech supports the relationship of its current CABS expense to revenue ratio by noting that its prospective 1989 ratio is 23.88 and that its 1988 ratio, using PYCOS data, is 20.7. In its view, the 1989 ratio comports with Illinois Bell's past performance even if the ratio does not track AT&T's "hypothesized average."[349]

379a. Bell Atlantic replies that AT&T's analysis, as it pertains to Bell Atlantic, is distorted because AT&T failed to use actual and available data to make its computations. Bell Atlantic's reply includes Exhibit 22-A which sets out the ratios in question. In Bell Atlantic's opinion, these ratios fall well within AT&T's acceptable range.[350]

c. Discussion

380. The Bureau has reviewed the Ameritech and Bell Atlantic tariffs, AT&T's petition, and the replies of the two carriers. We do not find AT&T's analysis persuasive. While the amounts of CABS expenses appear to be somewhat high, AT&T's analysis offers no evidence that the CABS expenses are overstated. Furthermore, as there is no correlation between access revenues and expenses incurred for the CABS we believe that AT&T's analysis is flawed. We reject its contentions that Ameritech and Bell Atlantic have overstated their CABS expenses.

2. Allocation of Costs to Interstate Non-Access

a. Petitions

381. ALC notes that while the Commission's Part 69 Rules allocate costs between the various access categories and LEC-provided interexchange services, several carriers have not allocated major cost categories such as access and marketing expenses directly to their interexchange services. For example, ALC argues, US West should have allocated some marketing expenses to its interexchange services to account for marketing of its credit card. ALC contends that such underallocation by the BOCs permits them to artificially underprice their interexchange services while raising the access rates competing interexchange carriers must pay. ALC argues that the Bureau should investigate the BOCs' cost allocation methods to ensure that their interexchange services are recovering directly assignable costs as well as the appropriate shares of common costs.[351]

b. Replies

382. Ameritech explains that only Ohio Bell assigns the interstate access expense (Account 6540) to the interstate interexchange category because Ohio Bell uses a different settlement process than the remaining Ameritech companies. Ameritech acknowledges that Illinois Bell does not assign access expense to its interexchange services. Ameritech explains that, other than Ohio Bell, its settlements with other exchange carriers constitute revenue sharing arrangements and are therefore not part of the access revenue requirements projected in this filing.[352]

383. NYNEX replies that ALC presents no evidence of improper cost allocation to the interexchange category. NYNEX indicates that only New York Telephone has interexchange (corridor) traffic and that these costs are imputed to NYT and reflect the same access rates paid by other ICs. In NYNEX's view, ALC's assertion that the RBOC's are cross-subsidizing and under-pricing interexchange services for the purpose of competitive gain is unsupported.[353] US West explains that the study areas cited in ALC's Petition do not have interexchange investment, and thus, no marketing expenses are allocated to the interexchange category.[354]

c. Discussion

384. We have reviewed ALC's petition, and the tariffs and replies of Ameritech, NYNEX, and US West. Part 69 of the Commission's Rules requires that carriers assign interstate marketing expense to the access elements and the interexchange category on the basis of billed revenues. Customer Operations Services Expenses are assigned to the access elements and in some instances to the interexchange category using a variety of methods that are prescribed in Sections 69.406 to 69.408.

385. Our analysis of marketing expenses indicates that many carriers failed to comply with the Part 69 procedures and have not apportioned sufficient marketing expenses to the interexchange category. As part of our analysis we calculated the percentage of interstate marketing expenses that the carriers assigned to the interexchange category. We compared that percentage with the percentage of interstate net revenues the carriers assigned to the interexchange category and calculated disallowances for all carriers' access charges for which the net revenue percentage was higher than the percentage of marketing expenses assigned to the interexchange category.[355] We limited this disallowance to those carriers that misassigned more than $100,000 to the access elements. The disallowances for each carrier are shown in Appendix E.

386. Our analysis of Customer Operations Services Expenses indicates that the majority of the carriers appear to have complied with the Commission's Rules in apportioning these expenses to the interexchange category. We did discover some carriers, however, that failed to apportion any of these expenses to the interexchange category. Therefore, we calculated disallowances from the carriers' access charges that these carriers must reassign to the interexchange category. We calculated the amount of the reassignment by applying the average amount of this expense that the remaining BOCs or the remaining Independents apportioned to the interexchange category. For those carriers that failed to apportion any Customer Operations Services Expenses to the interexchange category, we calculated a disallowance by applying these percentages to the carriers' projected interstate Customer Operations Services Expenses to determine the disallowance for each carrier. The disallowances, which were also limited to those carriers that misassigned more than $100,000, are shown in Appendix E.

3. Allocation of Cable and Wire Facilities Expenses to Non-Access

a. Petitions

387. AT&T asserts that Bell Atlantic has underallocated Cable and Wire Equipment Facilities (C&WF) investment to the non-access interexchange element. AT&T contends that because interexchange (Category 3) C&WF are used for both access-related and non-access-related functions, Cable and Wire Facilities investment must be apportioned between the access rate elements and the non-access interexchange rate element. AT&T maintains that although Bell Atlantic developed allocation factors in its Special Study No. 2 to achieve such apportionment, it has apparently not used these factors in the development of its access revenue requirements. AT&T argues that if Bell Atlantic used the factors included in its study, approxi-

mately $1,168,000 would have been assigned to the non-access interexchange element, thereby reducing Bell Atlantic's access revenue requirements by $472,000.[356]

b. Replies

388. Bell Atlantic explains that the misallocation of Bell of Pennsylvania's "Special Study 2" factors was the result of a transcription error in the TRP which was corrected in its errata filing. Bell Atlantic explains, however, that the correct costs were actually used in the calculation of its rates. Bell Atlantic contends that AT&T's Appendix C-11, Table 1, Line 3, C&WF Category 3 message amount for New Jersey Bell is understated by the directly assigned message interstate investment.[357]

c. Discussion

389. The Bureau has reviewed AT&T's petition, Bell Atlantic's tariff and errata filings, and Bell Atlantic's reply. We conclude that Bell Atlantic has corrected the errors noted by AT&T. In our view, AT&T has failed to present sufficient evidence to warrant disallowances or investigation of this issue.

4. Allocation of SNFA Costs

a. Petitions

390. MCI notes that while the BOCs have allocated some costs to shared network facility arrangements (SNFA) in Charts COS-1(H) and COS-1(P), no data are provided regarding allocation of these costs between SNFA switched access and SNFA special access or for the demand associated with such costs. As a result, MCI maintains that it cannot determine if the carriers propose to discriminate between SNFA and tariffed services, and argues that the Commission should investigate the reasonableness of the SNFA charges.[358]

b. Replies

391. According to NYNEX, no data about the allocation of SNFA costs between switched access and special access were provided because there is "no such thing" as SNFA switched access or special access and so, there are no associated costs.[359] Ameritech and NYNEX argue that SNFAs pertain only to the leasing of switching capacity to AT&T and are not at all related to switched access services.[360] Other BOCs also dispute MCI's claim that there are similarities between SNFAs and switched access.[361]

392. Several carriers conclude that MCI's allegations are inappropriate for this access proceeding.[362] US West states that it expects the Commission to reaffirm its decision that special access and SNFAs are not like services and thus that different rates could not constitute unlawful discrimination.[363]

c. Discussion

393. We have reviewed MCI's petition, its comments on the LECs' errata filings, and the tariffs and replies of the carriers. In our view, MCI has not provided the Bureau with a basis for concluding that an investigation of the allocation of costs to SNFAs is warranted at this time. Accordingly, we deny this portion of MCI's petition.

F. *Lifeline and USF Charges*

1. Petitions

394. ALC contends that NECA's proposed Lifeline and Universal Service Fund (USF) charges should be rejected, because NECA failed to apply charges to the interstate intraLATA presubscribed lines of the RBOCs and to the interLATA international presubscribed lines of GTE Hawaiian Telephone. According to ALC, this unlawfully exempts LECs (particularly BOCs) – which dominate the interstate intraLATA toll market – from paying their share of USF and Lifeline charges. At the same time, ALC asserts, this procedure results in an understatement of the presubscribed line count on which USF and Lifeline charges *are* assessed, causing such charges per line to interexchange carriers to be overstated by almost 40 percent.[364]

395. ALC complains that the Commission's current cost allocation rules, which allocate NECA's total cost of operations to each of its major functions on the basis of projected revenues, result in USF and Lifeline charges that recover administrative costs in excess of those that would be attributable to those programs under a cost causative allocation scheme. ALC urges the Bureau to investigate the actual cost to NECA of billing the USF and Lifeline charges in order to develop a record that would support rules amendments requiring a closer correlation between the cost NECA assigns for recovery through USF and Lifeline charges, and its actual costs.[365]

396. ALC also contends that Ameritech has improperly allocated transitional and long term support payments among its operating companies in developing carrier common line charges. In particular, ALC claims that Ameritech has distributed support payments among its operating companies on the basis of total access lines, when such payments would be allocated more accurately based upon disaggregated NECA data, if available, or, if not available, based upon operating company common line demand projections. By way of illustration, ALC observes that the proposed carrier common line charges for Michigan substantially exceed the proposed charges for Ameritech's other operating companies, and that these charges are higher than those of any other BOC, Cincinnati, NECA, or GTOC. ALC asserts that if payments were allocated on the basis of common line demand, Michigan's carrier common line rates would be reduced by more than 10 percent.[366]

2. Replies

397. NECA disputes ALC's contention that it incorrectly excluded interstate intraLATA presubscribed lines in the calculation of its rates for USF and Lifeline Assistance. NECA maintains that Sections 8 and 13 of its tariff make it clear that only interstate interLATA lines would be counted and that such calculations reflect the intent of the Commission.[367] Several LECs strongly disagree with ALC's perspective. They note that NECA's treatment is consistent with Joint Board and Commission decisions.[368] Parties also note that ALC's objections are inappropriate for this proceeding;[369] that ALC is merely repeating arguments it made in other proceedings;[370] and that ALC's continued objections should be raised in a petition for Rule Making.[371]

398. NECA contends that ALC's objections to NECA's allocation of USF expenses should be disregarded because ALC acknowledges that NECA's allocation method is con-

sistent with Commission Rules and that ALC's request is merely an untimely request for reconsideration of the Commission's *NECAExpenses Order*.[372]

399. Ameritech finds ALC's charges "curious" because CCL costs are not traffic sensitive. Ameritech also notes that Section 69.612 of the Commission's Rules require the allocation of support payments on the basis of access lines and not on demand projections as ALC suggests.[373] Ameritech adds that Michigan Bell's CCL charge is higher than that of other Ameritech Operating Companies because it continues to have an inside wire revenue requirement whereas other companies have retired or reclassified this investment.[374]

3. Discussion

400. The Bureau has reviewed the NECA tariff, both of ALC's petitions to reject, NECA's reply, and the comments of other exchange carriers in support of NECA's tariff. We find that no compelling argument has been presented by the petitioner which would require rejection or warrant investigation of NECA's USF and Lifeline rates at this time. We conclude that the issue of whether USF and Lifeline charges should be assessed on interexchange intraLATA presubscribed lines of the RBOCs and interLATA international presubscribed lines of GTE Hawaiian Telephone is beyond the scope of this access filing. ALC has had ample opportunity to raise these issues in more appropriate forums.[375] Accordingly, we deny this portion of ALC's initial petition as well as its subsequent petition to reject in part.

401. Upon review of NECA's tariff, ALC's petition and NECA's reply, we find no basis to proceed with ALC's request for an investigation of NECA's costs of billing USF and Lifeline charges. ALC is not complaining that NECA failed to comply with Commission Rules, nor is ALC attacking the lawfulness of NECA's rates in this proceeding. Furthermore, ALC concedes that the problem could only be remedied with a Rule Making.[376] In the absence of any compelling arguments, we conclude that this issue does not warrant investigation at this time.

402. The Commission's Rules require Ameritech, as a Level 1 Contributor, to make support payments "based upon the amount of [its] 1988 contributions to the association Common Line pool in relation to the total amount of 1988 Common Line pool contributions of all other Level 1 and Level 2 Contributors." 47 C.F.R. § 69.612(a)(1). The rules are silent regarding how the burden of this payment should be allocated at the operating company level. Accordingly, Ameritech's intracompany allocation is lawful if it produces the payments required by Section 69.612 and if the allocation method is reasonable. In addition to reviewing ALC's petition, Ameritech's tariff, and Ameritech's reply,[377] we examined Ameritech's method of allocation. While Ameritech's method may not produce the best outcome for ALC or be most consistent with the method used to allocate payments among the RBOCs, we cannot say that it violates the Commission's Rules or is unreasonable. For these reasons, we deny ALC's request for a reallocation of Ameritech's support payments among its operating companies.

G. *Switched Access ; Special Access Surcharge*

1. Total CCL Costs; Common Line Revenues and Revenue Requirements

a. Petitions

403. MCI submits that NECA has understated its special access surcharge revenues by approximately $45 million, understated pre-July 1983 Centrex subscriber line charge revenues by approximately $32 million, and understated terminating minute demand by approximately 6.0 billion minutes. MCI asserts that NECA's annual 1989 access filing projects a 51 percent decline in special access surcharge revenues, or $42.9 million. MCI contends that NECA has not justified this figure, and asserts that $88.3 million, as approved by the Commission last year, should be used as this year's estimate.[378] MCI observes that the subscriber line charges for Centrex lines placed in service before July 27, 1983, have incrementally increased pursuant to Section 69.203(b) of the Commission's Rules, 47 C.F.R. § 69.203(b), and that the final increase, to $6 per line, will become effective on April 1, 1989.[379] Despite this final increase, MCI submits, NECA's 1989 access tariff filing projects a 22.4 percent decline in Centrex subscriber line charge revenues to $82.7 million. MCI submits that Centrex subscriber line charge revenues should increase by approximately the same percentage as they increased from the 1987 to 1988 filings, 7.6 percent, which would project $114.4 million in such revenues for 1989, or $31.7 million more than NECA's current projection.[380]

404. In addition, MCI submits that the 20.9 percent increase in uncollectibles proposed by NECA is unreasonable since subscriber line charges and CCL charges are not difficult to collect. MCI argues that uncollectibles should be returned to the 1988 level of $27.649 million.[381] MCI also notes that NECA's proposed marketing expenses represent a 12.5 percent increase from the PYCOS amount, and argues that such an increase is unreasonable during these times of low inflation. Because NECA developed its estimates of CL expenses and investment by aggregating the forecasts of each LEC, MCI deduces that NECA's inordinate marketing expenses are the result of unreasonable increases budgeted by individual LECs. Similarly, MCI asserts that NECA's forecast of a 7.5 percent increase in corporate expenses, a sum of individual LEC forecasts, is unreasonable and should be limited to the current 5 percent inflation rate.[382] MCI also submits that NECA's unreasonably large projected increase for COE Transmission may be attributable to individual LEC forecasts of unreasonable Category 4 growth. MCI asks the Commission to reduce NECA's forecast of a 12.47 percent increase in COE Transmission growth to the 6.8 percent NECA projects for Cable and Wire investment, yielding a net reduction of $36.8 million.[383]

405. MCI also notes that USF and Lifeline revenue requirements used to be bundled into the CCL revenue requirement and recovered via the CCL charge but now are recovered through separate charges on the basis of presubscribed lines. MCI postulates that NECA's requested $88.6 million CCL revenue requirement, a 4.8 percent increase from what it projected in its 1988 filing, indicates that NECA has failed to remove USF and Lifeline costs. MCI notes that making all the corrections it has proposed will reduce NECA's terminating CCL charge from $0.0213 to $0.0193. MCI asserts that this decline will require NECA to recalculate and decrease the long term support obligations of contributing carriers, and that each contributor must then recalculate and lower its depooled CCL charge to reflect lower support payments.[384]

b. Replies

406. NECA argues that the flaws alleged by MCI do not exist in NECA's annual filing. First, NECA submits that its proposed decline in special access surcharge revenues is consistent with trend analysis, especially in light of customers' transition from WATS-type services to CL-based services. NECA contends that MCI improperly used the 1988 projection ordered by the Commission when it could have based its calculations on actual data. NECA maintains that its actual 1988 special access surcharge revenues were not $88 million as ordered by the Commission, but $66.9 million. Consequently, NECA argues, its $42.9 million projection does not represent a 51 percent decline from 1988.[385]

407. NECA further argues that MCI's comparison of COE-Transmission investment growth and growth in Cable and Wire Facilities investment is arbitrary and that its own method of calculation, based on a review of period-over-period average net investment, is more reasonable since it accounts for plant replacements, changes in depreciation rates, and plant growth.[386] In addition, NECA maintains that its projected increase in uncollectibles is reasonable in light of the significant lag time between billing and the realization that the amount is uncollectible.[387] NECA also opposes MCI's argument that its projected marketing and corporate expenses are unreasonable, and argues that MCI has emphasized LEC forecasts that are higher than average and ignored those that are lower than average.[388] Because its marketing and corporate expense forecasts are based on LEC projections, however, NECA notes that it will take into account any adjustments made by the Commission in calculating revisions to its nationwide average CL rate.[389]

408. NECA also contends that MCI's misgivings regarding the decline in revenue projections for pre-July 1983 Centrex services are unfounded. NECA cites changes in business needs and rates which have caused customers to migrate from embedded Centrex services to upgraded Centrex services.[390] In addition, NECA maintains that it properly removed USF and Lifeline Assistance revenue requirements from its CL revenue requirement. NECA argues that the subscriber line charge waiver portion of the Lifeline assistance revenue requirement was correctly included in the projected end user revenues so as to reduce the CCL revenue requirement.[391]

c. Discussion

409. The special access surcharge of $25 per month is assessed on users of voice grade special access lines capable of "leaking" usage into the public switched network, such as those linked to a PBX which can connect the special access line to a local exchange line. If the customer certifies that a line is not used in this manner, that line is exempt from the surcharge. First assessed in the 1985 access tariff filings,[392] the $25 charge was extended indefinitely in this year's *Waiver Order*.[393]

410. In its 1988 access filing, NECA projected special access surcharge revenues of $64.26 million, a 52 percent decline from the PYCOS period. The Bureau deemed NECA's estimate unwarranted, and adjusted the amount to $88 million, approximately a 34 percent decline.[394] Comparing NECA's claimed actual special access surcharge revenues of $66.9 million with its projection of $42.9 million for 1989, NECA proposes approximately a 36 percent decline. The Bureau has reviewed NECA's tariff filing, MCI's petition, and NECA's reply comments. NECA's explanation of this issue adequately addresses MCI's arguments, and no adjustment of NECA's special access surcharge revenues is necessary.

411. We are also satisfied with NECA's explanation of its increases in COE-Transmission investment, uncollectibles, and corporate and marketing expenses. Nor do we agree with MCI that NECA has improperly included USF and Lifeline Assistance amounts in its CL revenue requirement. Finally, we agree that pre-July 1983 Centrex SLC revenues will most likely decline in light of increasing incentives for customers to switch to upgraded services, and we note that NECA's projected 22.4 percent decline is consistent with the declines projected by the BOCs.[395] MCI's petition is therefore denied regarding these issues.

2. Individual LEC CCL Costs; Individual Common Line Revenues and Revenue Requirements

a. Petitions

412. MCI claims that the other LECs' annual filings contain errors similar to those it cites in NECA's filing. MCI asserts that, like NECA, several LECs have underestimated special access surcharge revenues. MCI argues that the Commission should direct such LECs to increase surcharge revenues to 1988 levels and to recalculate their proposed depooled CCL charges to reflect the increased revenues.[396] MCI also contends that many carriers incorrectly projected large decreases in Centrex subscriber line charge revenues and should be directed to recalculate their depooled CCL charges to reflect an increase in the Centrex subscriber line charge.[397]

413. In addition, MCI submits that the average net investment associated with common line proposed by some LECs is overstated in view of demand and historical investment. MCI notes that it analyzed common line prospective investment by comparing historical investment filed by the LECs with third quarter 1988 ARMIS data. MCI requests that the common line average net investment for such carriers be reduced, and that appropriate reductions be made to the expenses associated with common line.[398]

414. US Sprint contends that the common line revenue requirement increases proposed by several carriers are unduly large in light of the continuing phaseout of inside wire revenue requirement and the decrease in transitional support payments to LECs that exited the NECA common line pool. US Sprint asserts that these carriers have not sufficiently justified such increases, but submits that the claimed increases appear to be the result of unwarranted increases in corporate operations, marketing expenses, inside wire revenue requirement, and uncollectibles.[399]

415. US Sprint also notes that the LECs' calculation of their CCLCs involves predicting the number of customer premises terminations. US Sprint argues that several LECs have predicted significant changes in the number of customer premises terminations from the historical period. US Sprint asserts that because end user charges, including the special access surcharge, will recover almost 60 percent of total interstate common line revenue requirement, it is important that the number of projected customer premises terminations be as accurate as possible. US Sprint therefore argues that the Commission should require carriers to explain the change in the number of customer premises terminations and, if necessary, should

require them to revise their subscriber line charge revenue and CCLC revenue requirement estimates accordingly.[400]

b. Replies

416. Ameritech contends that MCI's criticism of its companies' common line average net investment calculation assumes that third quarter 1988 ARMIS data are more accurate than 1988 PYCOS data. Ameritech notes that in developing prospective common line average net investment it used neither PYCOS nor ARMIS data, but based its calculations on analysis of capital requirements for 1989.[401] In addition, Ameritech opposes MCI's contention that Michigan Bell's originating CCL MOU forecast is too low and argues that that forecast complies with historical trends in that service area.[402] Ameritech also disputes MCI's argument that it incorrectly projects a large decrease in special access surcharge revenues, and argues that MCI's calculations ignore historical trends, which portend a steep decline in such revenues.[403] Ameritech further contends that it has not incorrectly projected large decreases in pre-July 1983 Centrex subscriber line charge revenues, and that MCI ignores the historical trend downward.[404] In response to US Sprint, Ameritech argues that Michigan Bell and Wisconsin Bell properly forecasted access lines as they relate to subscriber line charge revenues.[405]

417. Bell Atlantic contends that it did not forecast the 42 percent decline in pre-July 1983 Centrex lines claimed by MCI, but predicted a 10 percent decrease in revenues and a 14.7 percent decrease in embedded lines, consistent with past trends. Moreover, Bell Atlantic submits, the difference between pre-July 1983 and post-July 1983 Centrex lines is immaterial for ratemaking purposes because all Centrex lines are now subject to the same subscriber line charge.[406] In addition, Bell Atlantic faults MCI's argument that it should reduce its proposed CCL rate and argues that MCI incorrectly analyzed third quarter 1988 ARMIS data and 1988 PYCOS data.[407] Bell Atlantic argues that its forecast of a 40 percent decline in special access surcharge revenues is based on historical trends.[408] Bell Atlantic also objects to US Sprint's argument that it has understated customer premises terminations for 1989, and argues that US Sprint underestimates growth in residence lines.[409]

418. BellSouth argues that it has not understated 1989 special access surcharge revenues, and asserts that it has not projected the 64.09 percent decline cited by MCI but has instead projected a decline of 47 percent. BellSouth theorizes that MCI used 1988 forecasted revenues rather than 1988 actual data.[410] Cincinnati argues that its analysis shows a dramatic reduction in line termination subject to the special access surcharge, from 6,000 in December 1986 to under 1,000 by the end of the third quarter of 1988, and maintains that its projected revenue for the upcoming test period is reasonable.[411] In addition, Cincinnati asserts that its projected decrease in Centrex subscriber line charge revenues is the result of the transfer of Centrex lines from one classification to another. Cincinnati also contends that its average net investment for common line is not overstated and that MCI's analysis fails to account for the fact that Cincinnati's NTS gross allocator (SPF) is phasing up to 25 percent.[412]

419. NYNEX asserts that it predicts a 26.4 percent decline in special access surcharge demand for New England Telephone and a 32.4 percent decline for New York Telephone over the historical period, which are substantially lower that the 52 percent disallowed by the Commission in 1988. NYNEX argues that its projections track historical trends and disputes MCI's method of calculating special access surcharge demand.[413] In addition, NYNEX notes that its charges during the prospective period will be identical for all Centrex lines, pre- and post-July 1983, and argues that it calculated Centrex subscriber line charge revenues based on total Centrex demand. NYNEX argues that MCI has not properly interpreted the historical trends, which show a sharp decrease in pre-July 1983 Centrex lines. NYNEX also argues that its embedded Centrex lines will decrease due to introduction of its Intellipath Digital Centrex service as well at the elimination of the subscriber line charge differential between pre- and post-July 1983 Centrex lines. Moreover, NYNEX notes, NET's distinction between the two types of Centrex lines is only made for TRP reporting purposes and its post-July 1983 growth more than offsets the projected decline in pre-July 1983 Centrex lines.[414]

420. NYNEX additionally asserts that the New England (Massachusetts) inside wire expenses are largely the result of total company increases in marketing and corporate operations expenses, as well as plant expenses such as higher wages. NYNEX also maintains that increases in the projected total company marketing expenses for both New York and New England (Massachusetts) were flowed through to the common line element consistent with allocation ratios of the historical period and with the Commission's Part 36 and Part 69 rules. NYNEX submits that the increase in corporate operations expenses at the total company level has been correctly allocated to the common line category.[415]

421. NYNEX also argues that US Sprint misunderstood the historical growth rate for New York's single line business customer premises terminations. NYNEX submits that it has revised its method for calculating the number of single business lines so as to count more such lines and that US Sprint erroneously deems this adjustment demand growth. In addition, NYNEX contends that its projected decline in non-Lifeline customer premises terminations is the result of efforts by New York Telephone and the New York State Department of Social Services to promote Lifeline services.[416] Similarly, Nevada argues that its forecast of residential customer premises terminations is in accord with historical trends and that US Sprint has overstated the decline in demand for such customer premises terminations by including only non-Lifeline customer premises terminations. Nevada notes that it has revised its Lifeline service by making it available to more subscribers.[417]

422. Nevada also argues that it has not understated its special access surcharge revenues. Nevada contends that MCI ignores the fact that demand for voice grade special access lines in its service area has been declining steadily, and argues that most of its customers ordering special access service are exempt from the surcharge.[418] Pacific argues that its projected reduction in average net investment for common line is accurate, and contends that MCI does not adequately explain its analysis to the contrary.[419] Pacific also objects to MCI's allegation that its pre-July 1983 Centrex subscriber line charge revenue projections are understated and notes that MCI based its calculations on 1988 projections rather than actual data. Similarly, Pacific notes, US Sprint's claim that Pacific's increase in projected customer premises terminations reflects growth

incompatible with the historical trend is erroneous. Pacific notes that apparent shifts in demand between classes of service from 1988 to 1989 are the result of its implementation in January 1988 of a customer premises termination demand and revenue model to account more accurately for the number of customer premises terminations attributable to each class of service. Pacific notes that the total number of customer premises terminations was not affected by this exercise.[420]

423. Southwestern submits that it has not overstated its common line investment. Southwestern faults MCI's comparison of third quarter ARMIS data and the information filed by Southwestern in its TRP, and notes that MCI's proposed adjustments request a change of less than one half of one percent.[421] Southwestern also objects to MCI's contention that its projected decline in special access surcharge demand is excessive, and asserts that its projection is based on a well-established trend in its study area.[422]

424. US West notes that, while verifying the number of customer premises terminations during 1987 and 1988, it discovered and corrected errors in the billing of some single line business accounts. As a result, US West argues, historical data reflect a decrease in single line business lines in 1988 and an increase in multiline business lines. In addition, US West contends that whenever a pre-July 1983, or "grandfathered" Centrex customer changes or adds to its service, it loses its "grandfathered" status, thus causing an increase in multiline customer premises terminations and a decrease in Centrex customer premises terminations. US West argues that US Sprint examined only multiline customer premises terminations when it should have examined all business and residence access lines as two collective categories. Furthermore, US West submits, MCI bases its contention that Centrex subscriber line revenues are decreasing on pre-July 1983 Centrex lines only. It asserts that the revenues for such lines should decrease every year and that effective April 1, 1989, all Centrex customers will be assessed the full multiline rate.[423]

425. GTOC asserts that customers are increasingly becoming exempt from the special access surcharge, leading to a decreased special access surcharge demand forecast. GTOC also contends that MCI offers no support for its argument that GTOC has underprojected Centrex subscriber line charge demand. GTOC argues that MCI relied only on pre-July 1983 Centrex units in its assertion. GTOC submits that since no new subscribers can be added to the pre-July 1983 customer base, pre-July 1983 Centrex cannot show positive growth, and argues that such customers have been steadily changing to other services.[424]

c. Discussion

426. The Bureau believes that the carriers have adequately responded to MCI's arguments regarding special access surcharge revenues and CL average net investment. The carriers have also sufficiently justified their projected pre-1983 Centrex revenues. We realize that some of the carriers' projections exceed the 22.4 percent decline projected by NECA,[425] however, such carriers have provided extensive cost support and have responded to MCI's particular contentions. Moreover, since those carriers will assess the same subscriber line charge for pre- and post-1983 Centrex lines, the projected decline will not affect underlying rates. MCI's petition is therefore denied to the extent that it requests investigation of these issues.

427. In addition, we believe that the carriers have satisfactorily responded to the contentions of US Sprint. Accordingly, US Sprint's petition is denied regarding the carriers' CL revenue requirements.

3. Pacific Telesis Distribution of Support Obligations

a. Petitions

428. MCI contends that Pacific Telesis improperly allocated its entire support payment of $17.1 million to Pacific and arranged for a payment of $14 million from Pacific to Nevada to enable Nevada and Pacific to charge the same CCL. MCI argues that this unfairly burdens Pacific ratepayers because they will be assessed a higher CCL to compensate for the subsidy to Nevada. MCI asserts that because Pacific Telesis maintains separate tariffs and charges for the two carriers, the CCL charges should be calculated based on each company's respective costs.[426]

429. US Sprint likewise argues that the proposed transfer of support obligations would unduly burden Pacific's access customers and violate the principle of cost-based pricing. US Sprint also contends that Pacific's plan will artificially affect rate of return figures since Pacific's true common line expenses and net investment will not be known if it incorporates Nevada's costs into its common line rate base. US Sprint further contends that both Pacific and Nevada have failed to provide information to permit proper evaluation of the shift in revenue requirements.[427]

b. Replies

430. Nevada argues that the Commission's rules impose no restraint on the manner in which holding companies may apportion their Long Term and Transitional support obligations among their exchange carrier subsidiaries. Nevada also contends that the Commission allows depooling holding companies to file interstate common line tariffs reflecting average rates for their affiliates, and argues that Pacific Bell's contribution to Nevada Bell and to NECA represents only a $0.5 million increase over what Pacific would have contributed to the NECA CCL pool had it remained a participant.[428] Furthermore, Nevada argues, the contribution from Pacific will produce only a slight increase in Pacific's premium terminating CCL rate. Nevada asserts that its own rate would have risen dramatically had it been required to establish a terminating CCL rate based on its own revenue requirement, thus encouraging bypass. Finally, Nevada notes that the arrangement will not distort each carrier's reported earnings for the common line revenue requirement since Pacific's payment will be deducted from Pacific's reported CCL revenues and added to Nevada Bell's reported CCL revenues in each company's ARMIS report.[429]

431. Similarly, Pacific argues that the pooling arrangement will have no effect on its customers, and contends that the plan is consistent with Commission policy. Pacific submits that the pooling plan will prevent rate shock for Nevada's access customers, provide consistency for both companies' rate of return between 1988 and 1989, and help to preserve universal service and prevent bypass.[430]

c. Discussion

432. The Bureau believes that Pacific Telesis proposes a reasonable means by which to alleviate the impact of the April 1, 1989, CL depooling. Moreover, the method of support distribution proposed by Pacific Telesis will have a minimal effect on Pacific's underlying rates. The petitions of MCI and US Sprint are therefore denied to the extent they address this issue.

4. Demand

a. Forecasts of demand

i. Petitions

433. In its comments regarding the LECs' errata filings, AT&T observes that Southwestern has modified its 1989 baseline demand for switched access to account for a revision in the methodology it uses to develop its Percent Interstate Usage (PIU) factor. AT&T notes that Southwestern will use the PIU to apportion its 1989 terminating switched access traffic between the interstate and state jurisdictions for billing purposes. AT&T asserts that it has compared the terminating switched usage billed to AT&T by Southwestern in 1988 to its own actual terminating usage data, and contends that Southwestern's PIU factor allocates an excessive amount of terminating usage to the intrastate jurisdiction. AT&T submits that use of Southwestern's PIU thus results in understatement of Southwestern's projected terminating CCL and TS demand and overstatement of its CCL and TS rates.[431]

434. MCI observes that the past several quarterly reports regarding the growth in interstate switched access usage released by the Bureau's Industry Analysis Division indicate that industry traffic volume has grown at an annual rate of 13.5 percent. MCI argues that NECA's 1989 forecast of CCL demand is understated by 5.8 billion terminating minutes.[432] In its comments regarding the LECs' errata filings, MCI notes that NECA has increased its demand forecast satisfactorily. MCI submits that the errors remaining in NECA's forecast are due to errors in the LECs' prospective revenues and revenue requirements.[433]

435. MCI also submits that several LECs have underestimated common line demand, possibly due to their use of NECA's nine-month lag model.[434] MCI contends that the increase in CCL demand is attributable to various factors, including ICs' emphasis on common line switched access-based products for several classes of customers, continued reductions in long distance rates, and low nationwide inflation. MCI asserts that use of NECA's 17,2,4 model yields a more accurate figure.[435]

436. MCI also observes that because traffic sensitive access minutes represent the sum of common line minutes and WATS access line minutes, the growth in traffic sensitive switched minutes must be a weighted average of the growth in common line and WATS.[436] Nonetheless, MCI asserts, many carriers project a larger growth rate for traffic-sensitive switched minutes than common line minutes despite a decline in demand for WATS access lines. MCI contends that these carriers have either projected an incorrect decline in WATS access line demand or understated their common line demand. Although MCI concedes that the carriers' projections could result from a dramatic increase in the use of the remaining WATS access lines, it argues that such a large increase is not likely.[437]

437. US Sprint claims that the secular growth figures used by several carriers are too low. US Sprint observes that the LECs have alleged that demand growth in 1989 will be slower because the subscriber line charge will increase less than in previous years. US Sprint doubts this analysis, especially since the 1988 information provided by the LECs is for the first nine months of the year, annualized, so it does not include demand stimulation due to rate reductions which took place in December. US Sprint asserts that any demand stimulation caused by the December rate reductions should be captured in the 1989 baseline demand forecast as secular growth and that the only stimulation included in the 1989 demand quantities should be the demand response associated with the April 1, 1989, IC rate reductions.[438]

438. US Sprint also argues that the BOCs have used excessive bypass estimates to forecast their common line demand quantities. As a result, US Sprint contends, baseline minutes of use for 1988 have been trended downward and some LECs have improperly reduced their total common line minutes of use to reflect "out-of-trend" bypass. US Sprint claims that these bypass estimates are unjustified, especially in light of increases in the subscriber line charge and the low originating CCLC, as well as the fact that ICs have introduced several services which use switched access on both ends of a call, thereby stimulating use of the switched network.[439]

439. In addition, US Sprint maintains that the ratios used by the BOCs to derive common line minutes of use are understated. US Sprint argues that the only difference between common line and traffic sensitive minutes of use should be closed end WATS minutes, and that because WATS has accounted for a progressively smaller percentage of total industry common line demand, the gap between common line and traffic sensitive minutes should be decreasing.[440] Similarly, US Sprint argues that several BOCs have miscalculated the ratio of originating to terminating common line minutes.[441]

440. ALC asserts that Bell Atlantic has incorrectly forecasted total traffic sensitive minutes of use to decrease by 3.43 percent within the District of Columbia, and has forecasted only flat growth for West Virginia. ALC observes that Bell Atlantic's forecasts for minutes of use in the District of Columbia have traditionally been substantially below actual traffic-sensitive minutes of use, and argues that Bell Atlantic's present projection does not account for increasing construction, population growth, and other economic factors within the area.[442]

ii. Replies

441. Ameritech submits that for its region as a whole, the forecasted CCL to TS ratio is slightly higher than historical levels, but observes that a slight decrease in the ratio for individual areas would not be surprising given the introduction of the $0.01 originating CCL charge on April 1. Ameritech notes that the new charge will significantly reduce the terminating CCL charge, which is the charge applicable to the open end of WATS calls, thus making WATS less expensive relative to MTS and stimulating closed end WATS MOU. Ameritech also asserts that US Sprint has miscalculated Ohio Bell's forecasted ratio, which is actually above that of prior years, and contends that its errata filing adjusted Michigan Bell's ratio.[443]

442. In addition, Ameritech asserts that some companies predict TS MOU growth larger than CCL MOU growth but predict a decline in WATS two-wire channel

terminations because some low usage customers have shifted from WATS to services that use two open ends.[444] Ameritech further argues that its companies' secular growth rates for chargeable common line MOU are not understated. Ameritech contends that US Sprint incorrectly compares forecast growth with one historical value rather than a trend, and that it inappropriately compares Ameritech's baseline forecasted growth rates with 1987 and 1988 rates, thereby excluding any stimulation caused by the April 1 price reduction. Ameritech further submits that its companies did not base 1989 growth moderation exclusively on the smaller April 1989 increase in the subscriber line charge.[445] Ameritech also asserts that the increase in originating to terminating ratios for CCL minutes projected by Illinois Bell and Ohio Bell are consistent with historical trends and are warranted by the particular characteristics of the service areas in question. Furthermore, Ameritech contends, the originating to terminating ratio does not affect the total CCL MOU forecast.[446]

443. Bell Atlantic objects to ALC's argument that its forecasts for switched access demand in West Virginia and the District of Columbia are unreasonable. It contends that the growth in West Virginia during the PYCOS period was the lowest of its operating companies and that it based its projection on economic factors in the area as well as anticipated IC price decreases. Bell Atlantic also notes that it combined the data for Maryland and the District of Columbia to produce a single forecast for both areas and then allocated the total forecasted minutes between the two jurisdictions. Bell Atlantic asserts that this method did not consider the 1988 base level demand from which each company began and thus resulted in the appearance of a decrease in demand for the District of Columbia. Bell Atlantic therefore argues that the decrease in demand cited by ALC is not the result of an actual forecast of declining demand.[447]

444. Centel contends that MCI is mistaken in its argument that Centel (Florida) incorrectly forecasts TS switched access demand. Centel notes that Centel (Florida) does not project TS demand by forecasting CCL and WATS separately and then summing them, but instead compares the historical relationship between CCL and total TS demand and then applies an appropriate ratio to total TS minutes.[448]

445. Contel does not agree with MCI that it has improperly forecasted a decline in demand for WATS access lines or that it improperly predicts a larger growth in TS minutes than in CCL minutes. Nonetheless, Contel does acknowledge that it neglected to include 8.2 million FGD closed-end WATS minutes in the PYCOS demand for Virginia's TRP. Contel submits that because these are closed-end WATS minutes, the adjustment has no effect on CCL demand. Contel further asserts that its projection of a 59.8 percent growth in closed-end WATS minutes is mistaken because, as MCI contends, the total number of WATS lines are expected to decline. Contel submits, however, that it does not plan to correct this overstatement at this time since it will cause only a minimal increase in Virginia's projected TS rates.[449] In addition, Contel objects to MCI's argument that it has underforecasted prospective CCL demand for Contel (Texas), and asserts that MCI inappropriately compared its growth rates to those of GTOC.[450]

446. NYNEX asserts that MCI and US Sprint incorrectly argue that it has projected insufficient terminating CCL growth in light of increased originating to terminating ratios. NYNEX notes that while MCI and US Sprint concede that 800 ReadyLine, Pro America, and similar services will stimulate CCL demand, they fail to recognize that such services will stimulate more originating than terminating CCL minutes of use.[451] In addition, NYNEX disputes the accuracy of the lag model advanced by MCI and supports the use of a nine-month lag structure.[452]

447. Nevada objects to US Sprint's argument that its forecast of CCL to TS MOUs is too low while its ratio of CCL originating to terminating MOUs is too high. Nevada asserts that burgeoning growth in 800-like services in its service area will affect the historical CCL to TS and originating to terminating ratios because demand for such services, which was previously recorded as terminating CCL MOUs, is treated as closed-end WATS usage and is therefore subject only to TS changes. Because CCL usage is reduced, Nevada argues, the CCL to TS ratio is lower than it would have been if the terminating MOUs were subject to CCL charges, while the originating to terminating ratio increases because the reduction affects only terminating usage.[453] Nevada also contends that it has not projected a lower secular growth rate in total CCL MOUs as alleged by US Sprint, but that it has projected a growth rate 1 percent higher than in 1988.[454]

448. SNET argues that its growth rate has been lower than that of the industry due to unique economic and demographic factors in its service area. SNET further argues that US Sprint incorrectly used baseline demand for 1989 in reaching its conclusion that CCL MOU secular growth rates are too low, when it should have used ratemaking demand. Moreover, SNET asserts, it is not appropriate to use the growth rate of chargeable minutes to analyze its CCL demand, as both MCI and US Sprint have done. SNET asserts that the growth of total CCL minutes should be used. SNET also asserts that originating minutes are growing at a faster rate than terminating minutes due to the growth of 800-like services.[455]

449. Southwestern contends that its CL demand projections are consistent with historical levels and argues that MCI incorrectly bases its calculations on an industry growth rate for CL demand of 13.5 percent. Southwestern argues that the report cited by MCI and prepared by the Industry Analysis Division of the Common Carrier Bureau indicates that the 13.5 percent growth figure is an exponential trend of MOU since third quarter 1984 and does not account for the decline in the annualized growth rate since third quarter 1987.[456] Southwestern further argues that its nine-month lag model did capture recent CCL rate structure changes as well as the increase in the number of IC products using switched access service.[457] In addition, Southwestern argues that, while "in-trend" bypass is incorporated in its historical CL MOU data, it has not adjusted its forecast of CL baseline MOUs to reflect either "in-trend" or "out-of-trend" bypass. Southwestern also argues that terminating growth is lower than historical levels due to the trend away from WATS services and toward common line services, and because the percentage of demand associated with FX services (rated as terminating) has sharply declined.[458]

450. US West opposes US Sprint's objection to the negative demand growth in North Dakota and asserts that the 1988 historical TRP derived MOUs for North Dakota are inflated by an accounting arrangement for certain

North Dakota and Minnesota MOUs.[459] US West also contends that its increased originating to terminating ratio is due to stimulation of 800 ReadyLine and 800 ReadyLine-type services.[460] US West further argues that US Sprint has offered no evidence that its operating companies have incorrectly projected 1989 CL demand quantities.[461]

451. US West further opposes MCI's argument that its projected increases in TS and CL chargeable MOU are not consistent with WATS channel termination decreases. US West argues that MCI has misinterpreted US West's data and that its closed-end WATS MOU are declining at a rate consistent with the reduction in WATS two-wire channel terminations. US West also deems misleading the assertion by MCI that customers changing from WATS to common line generate more common line minutes.[462]

452. GTOC opposes MCI's claim that GTE-Southwest (Texas) incorrectly projects a larger growth in TS MOUs than in CL MOUs despite projecting a decline in demand for WATS access lines. GTOC submits that it has discovered an error in its historical TRP data for TS usage which produced this inconsistency, but argues that the error does not affect its forecasts or its proposed rates.[463] GTOC further notes MCI's contention that the inside wire expense for California is overstated, and submits that it has corrected this overstatement in its errata filing.[464]

453. United objects to MCI's assertion that Carolina Telephone and Telegraph forecasts terminating MOUs that are below the industry-wide average demand growth. United asserts that originating minutes are growing much faster than terminating minutes due to the shift of customers from WATS and 800 services to switched services, and due to Carolina's change from Bellcore's Sample Traffic Analysis and Report System (STARS) to AT&T's Jurisdictional Traffic Separation System (JTSS) for calculating terminating FGC minutes. United makes a similar argument regarding MCI's claim of an inconsistency between the demand forecasts of Ohio and Tennessee.[465]

454. NECA opposes MCI's argument that it should increase terminating CCL demand to account for the effects of new services. NECA notes that its errata filing accounts for new services, but submits that these minutes were assigned to the premium originating CCL demand category because demand migration from one-ended dedicated services such as WATS to two-ended switched services increases originating, not terminating, CCL demand. NECA also questions MCI's interpretation of the Industry Analysis Division's report regarding growth in switched access minutes, and argues that its own projection of 9.3 percent test period growth is reasonable.[466] NECA further contends that its nine-month lag model is "the most statistically supportable."[467]

iii. Discussion

455. In the *1988 Access Order*, we increased NECA's CCL MOU forecast by almost 11 billion minutes. We stated that NECA's method of forecasting, which was to sum the forecasts of the individual LECs, was fundamentally flawed.[468] Apparently in response to this criticism, NECA has developed its own forecast of industry CCL MOU. NECA has based its forecast on its own econometric model using pricing data developed in conjunction with AT&T.

456. Unlike previous annual access tariff filings, this year's filing evidences little disagreement among the parties regarding the correct forecast of national CCL demand for the test period.[469] NECA initially filed a 259.2 billion total CCL MOU estimate for the entire industry, based on the forecast from its econometric model and adjusted for revisions to BellSouth's historical MOU data.[470] In its errata filing, NECA revised its forecast of total industry CCL MOU to 264.4 billion minutes, based on stronger than expected growth in actual MOU in 1988 and new service overlays.[471]

457. NECA calculated its own forecast from a pooled cross-section time series econometric model it developed, rather than merely summing individual LEC forecasts to develop the industry forecast. NECA worked with AT&T to develop common line and traffic sensitive switched price indices and an equal access data series used in its model.[472] This cooperative effort has elicited less disagreement regarding the demand forecast than did methods used in previous annual access tariff filings. For example, AT&T has in previous years filed considerable comment regarding NECA's forecast of demand, but makes no such objection in its petition this year.

458. MCI deems NECA's forecast of 259.2 billion MOU understated, and proposes an adjustment of 5 billion additional terminating minutes.[473] NECA's errata filing did adjust demand by 5.2 billion MOU, but assigned that adjustment to originating minutes. Nonetheless, NECA's revised total demand estimate appears responsive to MCI's concerns. We will discuss the issue of originating to terminating ratios below.

459. Based on two separate analyses we have performed, NECA's forecast methodology appears reasonable. However, more recent data for demand through November 1988 do indicate that this methodology would now predict somewhat higher baseline demand, before accounting for price changes, than in the pending filings. The summary statistics and forecast of CCL MOU demand for these models and a discussion of this analysis are provided in Appendix F.

460. We also ran a trend regression on total CCL MOU for data through November 1988 (from NECA's filing of February 15, 1989) to compute a forecast and a 95 percent confidence interval of the forecast.[474] NECA's estimate was within the confidence interval of the trend regression.

461. This year, with the advent of depooling of the CCL rate, NECA and individual LECs filing their own CCL rates have provided estimates of CCL demand. The method of forecasting used by the Tier 1 holding companies is very similar to that used by NECA. Most companies performed pooled cross section time series models, with six- to 12- month lags on the price and income variables. Appendix F outlines the methods used by the Tier 1 holding companies to develop their forecasts. As was the case for total industry demand, these forecasts appear to use reasonable methods but fail to reflect recent actual demand growth.

462. This analysis thus indicates that the LEC forecasts, both on a total industry and individual company basis, understate likely CCL demand by a relatively small but significant amount. In Appendix F we detail this analysis and adjustments needed to correct the overstatement of rates which the filed demand estimates would produce if not corrected. This analysis also reflects appropriate adjustments for demand response, as discussed below.

463. The pleadings reveal some disagreement regarding the ratio of originating to terminating minutes. The CCL rate for originating minutes is set at one cent and the terminating CCL rate recovers the residual CCL revenue requirement. In its cost support, NECA asserts that historical originating to terminating ratios may be inaccurate because (1) double-billing of ReadyLine 800 and like services, which shifts minutes from originating to terminating, has not been eliminated from the historical data; (2) ratios for FGC and unmeasured FGD offices do not fully reflect new IC services; and (3) the LECs now report minutes instead of earned CCL revenue to NECA since the originating rate was set at zero on January 1, 1988.[475] Moreover, several companies now use JTSS rather than STARS to develop FGC originating to terminating ratios, since the LECs and AT&T agreed the factors from JTSS were more accurate than those from STARS.

464. Given these difficulties with the historical originating to terminating ratios, a comparison of historical to prospective ratios may be misleading. However, the most conservative test we can make is to compare the test period originating to terminating ratio to the historical maximum rate reported by the operating company.[476] This comparison is reported in Appendix F. Seven companies, New York Telephone, New England Telephone, Northwestern Bell, Contel (California), SNET, Carolina Telephone and Telegraph, and United (Pennsylvania), are reporting a test period originating to terminating ratio greater than their maximum historical value. NYT and NET provide documentation to indicate that this is due to ReadyLine 800 increases.[477] SNET does not quantify the effect, but states that WATS and 800 services are declining.[478] Northwestern Bell's increase appears to be due solely to Nebraska, but no explanation is given. Contel (California) and the two United companies forecast originating minutes by service (DDD, WATS, OPH, *etc.*), and develop terminating minutes via originating to terminating ratios.

465. Both NYT and NET provide sufficient information to justify their forecasted originating to terminating ratio. In addition, the forecasted originating to terminating ratios of SNET, Northwestern Bell, Contel (California), United (Pennsylvania), and Carolina Telephone and Telgraph appear appropriate in light of the many conversions to equal access scheduled by those companies in 1989. While those companies have heretofore derived FGC terminating minutes from historical originating to terminating ratios, the scheduled conversions will allow then to measure FGC terminiating minutes directly. Such direct measurement will lead to decreases in the carriers' terminating minutes.

466. The Bureau has reviewed the carriers' tariff filings, the petitions of MCI, US Sprint, and ALC, the carriers' reply comments, the errata filings, and the petitioners' comments regarding those errata filings. We find that no compelling argument has been presented that the tariff filings are patently unlawful so as to require rejection or that the tariffs warrant investigation at this time. Accordingly, the petitions are rejected to the extent they address the above issues.

b. Directory assistance surcharge

i. Petitions

467. AT&T notes that Bell Atlantic and Pacific propose to increase their directory assistance (DA) surcharges by 75 percent and 33 percent, respectively, and contends that these increases are not properly justified. AT&T acknowledges that the *Waiver Order* allowed LECs to impose DA surcharges to recover white pages costs other than those incurred in providing interstate directory assistance. AT&T asserts, however, that Bell Atlantic and Pacific project only minor increases in their subscriber lines, and that such increases are a major factor in the determination of white pages costs.[479] MCI similarly argues that Bell Atlantic and Pacific Bell have failed to justify the DA surcharge increases.[480]

ii. Replies

468. Bell Atlantic contends that AT&T is mistaken in its opposition to Bell Atlantic's DA surcharge increase. Bell Atlantic argues that AT&T ignores the fact that Bell Atlantic's DA surcharge is a regional rate which mitigates the rate variations resulting from differing characteristics within the region. Moreover, Bell Atlantic asserts, the proposed DA surcharge is appropriate when compared to the level of revenue shortfall experienced in 1988.[481] Nevada notes that it has increased its DA surcharge in its errata filing due to correction of an error in demand data.[482] Pacific asserts that its information surcharge increase was based on increased volumes and increased costs of administration and information management. Pacific further argues that the increase in the subscriber line charge usage factor automatically increased the allocation of white pages expense to the interstate jurisdiction, and notes that its rate of return for the information access category in 1988 was a negative 20.21 percent.[483]

iii. Discussion

469. The *Waiver Order* allows LECs to continue to separate from the information element those white pages costs not incurred in providing interstate directory assistance, and to recover such costs through a separate DA surcharge rate element.[484] The Bureau has reviewed the tariff filings, the AT&T and MCI petitions, and the carriers' reply comments. Because we find that the carriers have adequately justified the proposed DA surcharge increases, the petitions are denied to the extent they discuss this issue.

c. Equal access demand

i. Petitions

470. AT&T asserts that New York Telephone's demand for equal access line conversions is understated and therefore its EACR rate is overstated. AT&T argues that while New York Telephone expedited the conversion of equal access offices in the last two months of 1988, its filing does not accurately reflect the increased demand. AT&T further contends that New York Telephone has underestimated the number of lines to be converted during 1989, resulting in an overrecovery of $998,000 during the test period. AT&T requests that the Commission require New York Telephone to adjust its 1989 EACR rate to reflect the demand associated with its most recent equal access implementation schedule.[485]

ii. Replies

471. NYNEX opposes AT&T's argument that NYT did not accurately reflect the equal access demand increase experienced during the final two months of 1988. NYNEX contends that the data cited by AT&T were not available in time to be included in its access filing. NYNEX asserts that if it revised its forecast based on the more recent data, NYT's equal access demand forecast would decline, not increase. NYNEX also observes that AT&T has not divulged its method of calculating the alleged understatement of demand.[486]

iii. Discussion

472. The Bureau has reviewed NYT's tariff, AT&T's petition, and the NYNEX reply comments. Because we believe that NYNEX has addressed AT&T's contentions adequately and has justified its demand forecast, no further action is necessary.

d. Local Switching rate elements

i. Petitions

473. AT&T argues that Pacific has overstated its proposed LS2 switching rate element and understated its proposed LS1 switching rate element. AT&T contends that the LS2 element is excessive because Pacific did not account for additional demand associated with the expected switched services rate reductions by the ICs to reflect reduced switched access charges. Consequently, since Section 69.205 of the Commission's Rules, 47 C.F.R. § 69.205, states that the LS1 rate should be 87.7 percent of the LS2 rate, AT&T contends that the LS1 rate proposed by Pacific should be proportionately reduced. Moreover, AT&T argues, the current proposed LS1 rate is only 78.3 percent of the current proposed LS2 rate.[487]

ii. Replies

474. Nevada notes that it has increased its LS1 rate in its errata filing due to correction of an error in demand data.[488] Similarly, Pacific agrees that it has overstated its proposed LS2 rate element and understated LS1 and has corrected this error.[489]

iii. Discussion

475. Because Pacific and Nevada have corrected the errors alleged by AT&T, no further action by the Bureau is necessary.

e. WATS access line demand

i. Petitions

476. ALC notes that the originating CCL increase from $0.00 to $0.01 will curb the current migration from switched WATS access lines to switched common access lines since the former will not be assessed an originating CCL charge and the latter will. ALC observes, however, that the filings of many LECs predict that the demand for WATS access lines will continue to decline. As a result, ALC argues, the LECs' WATS demand projections are faulty and should be investigated.[490]

ii. Replies

477. BellSouth notes that ICs' heightened marketing activity offers no evidence to support ALC's argument that the increase in the originating CCL charge may be expected to curb decline in WATS demand.[491] NYNEX similarly argues that ALC's conclusion is incorrect, and asserts that the trend away from WATS and toward switched access-based services appears likely to continue. Moreover, NYNEX argues, ALC has only considered the change in usage rates affecting WATS services without also considering changes in other rates affecting alternative open end services, such as the scheduled April 1, 1989, increase in the subscriber line charge or the increased recurring and nonrecurring charges for WATS service. NYNEX cites other advantages of switched access-

based services not available to the WATS customer, such as detailed billing.[492] US West submits that it captured the full effect of the subscriber line charge increase and argues that the effect on migration between WATS access line service and switched access is negligible.[493]

iii. Discussion

478. The Bureau has reviewed the tariff filings, ALC's petition, and the carriers' reply comments. We find that no compelling argument has been presented that the relevant tariff charges warrant investigation at this time. Accordingly, ALC's petition is denied to the extent it addresses this issue.

H. *Special Access*

479. The petitions relating to special access charges address three main topics. Broadly, these are issues concerning demand projections; assertions of strategic pricing of HiCap (or DS1) special access; and arguments that proposed generalized tariffs for DS3 service are unlawful. In addition, some petitioners raise miscellaneous issues. We address each of these topics in turn.

1. Demand

a. Petitions

480. AT&T argues that several LECs appear to have underforecasted demand for DS1 and voice grade special access services, causing rates for these services to be overstated by a total of as much as $41.17 million.[494] AT&T contends that the demand forecasts filed by several of the BOCs display unexplained inconsistencies with the trends shown by their historical demand. Specifically, AT&T notes that BellSouth, NET, and Wisconsin all project an annualized increase of only 11 percent in average monthly DS1 channel termination demand from the September 1988 level despite much higher growth rates for the historical period.[495] In addition, AT&T does not believe that NYT has explained its projected reduced growth rate in average monthly DDS demand.[496] Similarly, AT&T argues, the demand projections for voice grade special access service filed by NYT, Bell Atlantic, Illinois, and Ohio exhibit marked discrepancies between the forecasted rates of decline and historical demand changes.

481. AT&T believes that these purported demand understatements are due to the BOCs' reliance on linear regressions to forecast their 1989 demand. AT&T analyzed the reported actual demand using an autoregressive integrated moving average (ARIMA) process. AT&T concludes that Bell Atlantic's understatement of demand for four-wire voice grade and two-wire WATS channel terminations would cause an over-recovery of more than $14.3 million while NYT's revenues for four-wire voice grade and WATS service and DDS access appear to be understated by a total of more than $16.4 million.[497]

482. Ad Hoc states that it has identified various "outliers" with respect to special access demand and cost data. Ad Hoc concedes that most of the carriers exhibit rational relationships between special access expense and demand changes.[498] Ameritech, Bell Atlantic, and Southwestern, however, exhibit differences that far exceed the BOC average.[499] ALC also urges the Commission to suspend and investigate the proposed rates of LECs that forecast increases in costs and investments while forecasting decreases in demand.[500]

b. Replies

483. The LECs advance three main arguments. First, they assert that their demand forecasts are reasonable. Next, various LECs identify purported flaws in AT&T's demand forecast methodology. Finally, the carriers reiterate their view that migration from DS1 to DS3 service will continue.

484. NYNEX contends that AT&T's proposed DS1 channel termination forecast is simply a baseline projection and that in order to forecast DS1 channel termination demand accurately, NET incorporated an overlay adjustment to its baseline DS1 demand to reflect anticipated migration from DS1 to DS3 service. This adjustment was based on customer requests for price quotations and actual circuit data.[501] NYNEX also asserts that NYT has provided extensive documentation in support of its forecast of demand for Special Access services. Ameritech also insists that it has properly calculated demand for voice grade and HiCap special access services. Ameritech further argues that Wisconsin's projection of DS1 demand is reasonable. Ameritech states that it expects reduced demand for DS1 service in part because of current low fill factors on hubbed DS1 serving configurations. In addition, Ameritech states that current levels of demand have been stimulated by relocations of ICs' points of presence (POPs) but that this represents an anomaly. BellSouth and Southwestern similarly defend their demand forecasts against the criticisms of AT&T and Ad Hoc.[502]

485. NYNEX asserts that AT&T has not demonstrated that its model adequately captures changing market dynamics. NYNEX states that the decline in voice grade demand can be expected to accelerate due to the acknowledged intention of ICs, including AT&T, to increase digital capacity.[503] In addition, NYNEX states that the DDS growth trend that AT&T identifies was caused by the move of one large customer and that NYT's forecast is thus consistent with historical data.[504] Moreover, NYNEX denies that the new originating CCL rate will retard or reverse the trend away from WATS service as ALC contends.[505] Ameritech argues that AT&T's demand model is unreliable because it did not use sufficient data for its ARIMA model to produce a reliable projection.[506] BellSouth also dismisses Intermedia's suggestion that its DS1 service demand is overstated. BellSouth asserts that demand response was calculated on the basis of a weighted average of rates for point-to-point and multiplexed circuits. Thus, the costs of multiplexing equipment were fully recognized.[507]

486. Finally, Ameritech, like several other BOCs, states that increasing DS3 demand will reduce demand for DS1 access, AT&T's assertion to the contrary notwithstanding.[508] BellSouth notes that, although the percentage rate of growth in DS3 demand is projected to be lower in 1989 than it was in 1988, the "further demand increase may quantitatively exceed" the prior year's growth due to the higher baseline demand. BellSouth states that this continued robust growth will be fueled in large part by DS1 migration. BellSouth also states that projected reduced DS1 demand is based upon information provided by ICs, notably AT&T, regarding planned conversions from DS1 to DS3.[509]

c. Discussion

487. We do not entirely accept AT&T's estimates of special access demand underforecasts. Nevertheless, our own analysis of the specific examples cited by AT&T convinces us that some LECs have projected out-of-trend decreases in demand for particular services that are not adequately explained. We therefore direct these carriers, as discussed in greater detail below, to revise their demand forecasts to the levels that our analysis indicates are reasonable. The affected carriers (BellSouth, NYT, and Ameritech (Wisconsin and Ohio)) are then directed to recompute their rates for the particular rate elements for which they have underforecasted demand using the revised demand figures established here and the revenue requirement that they projected for these rate elements, unless otherwise adjusted by this Order.

488. We find that Bell Atlantic has underforecasted demand for four-wire voice grade channel terminations and two-wire WATS channel terminations. Although trend data indicate that demand for these services is declining, Bell Atlantic has not demonstrated that the rate of decline it has projected is reasonable. In attempting to impeach AT&T's projection of its four-wire voice grade demand, Bell Atlantic relies upon data outside the PYCOS period. Bell Atlantic's revised forecast is, indeed, below AT&T's projection, but it is also above its own original estimate of demand. The fact that Bell Atlantic's revised forecast is higher than the one on which it based its rates does nothing to increase our confidence in Bell Atlantic's original forecast. Our own analysis of the data produces a forecast of 151,060 four-wire voice grade channel terminations based on a trend line regression. We believe that this number, which falls roughly at the midpoint between AT&T's projection and Bell Atlantic's revised forecast, is reasonable.

489. Similarly, our regression analysis of 1988 two-wire WATS channel termination demand conforms to AT&T's forecast of 113,969 terminations. We conclude that Bell Atlantic has not justified its forecast, which is approximately 20 percent below this forecast. However, because we have already disallowed $40.6 million in expenses from Bell Atlantic's special access revenue requirement based on inconsistent cost and demand data, we will not order a further disallowance here.[510]

490. We also conclude that BellSouth has underestimated the demand for DS1 channel terminations. Our analysis produces a projection of 20,657 DS1 channel terminations with a mean minus standard deviation of 20,469. This trend line fits quite well, indicating that demand has been consistent since 1987. BellSouth asserts that its below-trend demand forecast is the result of migration from DS1 to DS3. We find, however, that the increase in DS3 demand above the trend line is insufficient to explain the lower than expected demand for DS1 channel terminations. We therefore direct BellSouth to adjust its demand forecast for DS1 channel terminations to its trend minus one standard deviation, or 20,469 terminations.[511]

491. We find that NYNEX's demand projections are, in general, consistent with past trends and we conclude that they are not unreasonable, with one exception. We do not believe that NYNEX has adequately explained its below trend demand forecast for four-wire voice grade channel terminations in NYT territory. Therefore, we direct NYNEX to adjust its projected demand for four-wire voice grade channel terminations to 117,601 for NYT.[512] In contrast, we conclude that NYNEX has adequately explained the apparent anomalies in demand projections for DDS and DS1 channel terminations cited by AT&T and conclude that no adjustment is required for these services.

492. Finally, we conclude that Ameritech must adjust demand for DS1 channel terminations for Wisconsin and for two-wire WATS channel terminations for Ohio. Although Ameritech argues that the relocation of ICs' points of presence (POPs) is responsible for the stimulation of demand for DS1 channel terminations, the trend regression suggests that growth in demand can be expected to continue. We therefore direct Ameritech to increase DS1 channel termination demand for Wisconsin to 1352 terminations. In addition, Ameritech's forecast for two-wire WATS channel terminations is more than 4000 below trend. As that service has shown a steady decline, we do not believe that the projected migration to services such as ReadyLine and Megacom are sufficient to explain this forecast. Accordingly, we direct Ameritech to increase demand for two-wire WATS channel terminations in Ohio to the trend minus one standard deviation, or 25,403 terminations.[513]

2. Strategic Pricing

a. Petitions

493. AT&T states that, except for BellSouth, no LEC has included the costs of LEC-provided multiplexing in its calculations to demonstrate that its voice grade and DS1 rates fall within the "range of reasonableness" established in the Commission's recent *Strategic Pricing Order*.[514] That Order defined a crossover point of not fewer than four, nor more than eight, equivalent four-wire voice grade circuits per DS1 as the range of reasonableness. AT&T argues that multiplexing costs must be included in the crossover calculation because this equipment is indispensable to providing the functional equivalency between voice grade and DS1 service. AT&T contends that, if multiplexing costs are included, the HiCap rates filed by Ameritech, Southwestern, Mountain States, and Pacific are well outside the range of crossover points reflected in rates filed by other LECs.[515]

494. MCI and Ad Hoc concur in this analysis. MCI claims that all of the BOCs have proposed DS1 rates that are more than eight times their voice grade rates if multiplexing costs are included.[516] Ad Hoc concludes that only Nevada, NYT, and PNB have proposed crossover points of less than eight to one. Ad Hoc asserts that the LECs that have proposed strategically set rates have failed to demonstrate that their proposed rates are justified under the terms of the *Strategic Pricing Order*.[517]

495. MCI and US Sprint also argue that the BOCs are engaging in strategic pricing of DS3 access service. MCI contends that the crossover point from DS1 to DS3 access should be even lower than the crossover point from a four-wire voice grade to a DS1 circuit but that the BOCs have proposed precisely the opposite. According to MCI, "[i]t does not take a rocket scientist to determine that the demand for a DS3, which carries 28 times the capacity of a DS1 declines quickly when the DS3 is 54 to 70 times the cost of a DS1."[518] MCI requests that we suspend all of the LECs' proposed DS3 rates pending an investigation to determine the appropriate DS1 to DS3 crossover point.[519] US Sprint states that it has compared the generalized DS3 rates proposed by the BOCs and finds that, in many cases,

those rates are significantly higher than the rates being charged under the BOCs' existing ICB filings. Moreover, US Sprint argues, the BOCs' rates violate at least two of the guidelines established in the *Strategic Pricing Order*.[520]

496. MCI also argues that the LECs' strategically set DS3 rates violate the requirements of the Commission's *Volume Discount Practices Order*.[521] MCI asserts that the volume discounts proposed for DS3 channel terminations are unreasonable and unlawfully discriminatory because the LECs have failed to demonstrate that the discounts are cost-based or are justified by competitive necessity. MCI notes that NYNEX, Bell Atlantic, and Southwestern have filed tariffs proposing a tapered rate schedule for DS3 channel terminations.[522] MCI states that the facilities installed for the first circuit are generally more costly than those required once a system has been set up. Therefore, MCI argues, only a volume discount that recovers all initial investment on the first circuit ordered on a system (and provides for a lower rate for each additional circuit) would be cost-based. MCI argues that the cost support information provided by these carriers is insufficient to demonstrate that the proposed rate structures are cost-based.[523] Finally, MCI argues that the proposed volume discounts cannot be justified on the basis of competitive necessity. MCI contends that the elimination of the volume discount provisions of the LECs' tariffs would not be a significant threat to the LECs' market share given that they have priced DS3 access substantially above its cost.[524]

497. Conversely, various competitors of the BOCs argue that the proposed rates for DS1 and DS3 access are unreasonably low and have been set to gain an unfair competitive advantage over these petitioners. Intermedia, which identifies itself as "very much in its infancy,"[525] asserts that BellSouth's proposed rates are not justified by cost support material, are unreasonable in comparison to the rates proposed by other LECs, and appear to be inconsistent with the *Strategic Pricing Order*.[526] Intermedia notes that BellSouth has proposed to reduce its DS1 channel termination rate by 52 percent, a reduction that would have the greatest impact on short-haul circuits which are the most subject to competition. Intermedia also contends that BellSouth's rates are unreasonable in comparison to increased or modestly reduced DS1 rates proposed by 12 of the 15 BOCs that have filed revisions to their DS1 rates.[527]

498. Intermedia, LOCATE, and MFS also contend that the proposed rate reductions are inconsistent with arguments advanced by the BOCs in support of their strategically set HiCap rates that were the subject of the Commission's investigation in CC Docket No. 85-166.[528] Intermedia also asserts that BellSouth has understated the costs and overstated the demand for DS1 service and that the proposed rate reductions are therefore unjustified.[529] Intermedia concludes that BellSouth has deliberately set its rates below its costs in order to eliminate competition.[530] Intermedia therefore urges the Commission to reject, or, in the alternative, suspend and investigate BellSouth's proposed rates for DS1 access.[531]

b. Replies

499. Four LECs assert that they have not set their special access rates strategically.[532] Most carriers, while conceding that they have considered factors other than cost in establishing special access rates, argue that their rates comply with the guidelines established by the Commission in the *Strategic Pricing Order*. BellSouth states that its proposed reduction in DS1 rates is a direct consequence of its return to cost-based pricing. Thus, BellSouth concludes, Intermedia's contention that its DS1 rates are set at anticompetitively low levels is without merit. BellSouth also asserts that Intermedia's calculation of its voice grade to DS1 crossover point is erroneous but concludes that, because its DS1 rates are based on the costs of DS1 service, the crossover point is irrelevant to the reasonableness of its rates. BellSouth also states that it continues to monitor customer demand trends and will reintroduce strategic pricing if conditions warrant.[533]

500. In contrast to BellSouth's position, Nevada asserts that its special access rates are not strategically set, but does not attempt to demonstrate that its proposed rates are based solely on costs. Rather, Nevada argues that its DS1 rates fall within the zone of reasonableness for point-to-point circuits established in the *Strategic Pricing Order*.[534]

501. All of the LECs argue that multiplexing costs should not be included in the crossover calculation. NYNEX argues that the cost crossover analysis it presented in the strategic pricing investigation, and the standard established by the *Strategic Pricing Order*, address the LEC's costs to provide voice grade and DS1 services, not the customer's costs to substitute the latter for the former. NYNEX also notes that the crossover analysis was intended as a cost surrogate for the LEC's fully distributed cost data in assessing the reasonableness of the carrier's proposed rates. NYNEX asserts that, if multiplexing costs were to be included for purposes of the crossover analysis, the range of reasonableness would be eight to 16 circuits, rather than the four to eight circuits established by the *Strategic Pricing Order*.[535] Various carriers assert that their rates would fall within the revised range of reasonableness proposed by AT&T for DS1 rates including multiplexing costs.

502. US West makes a somewhat different argument. US West asserts that "[b]ased upon the criteria established by the Commission, [US West's] Target Private Line Transport rates are not strategically priced."[536] US West argues that its Target Rates, rather than the rates that it actually proposes in this filing to implement, are the rates that should be used in making any crossover calculations, "because the Target Rates would be the rates reflected in this filing had [US West] not proposed a transition plan."[537] US West also asserts that other allegations concerning its rates are misleading.[538]

503. Southwestern, on the other hand, argues that the *Strategic Pricing Order* merely creates a rebuttable presumption that rates above the eight to one crossover point represent strategic pricing of DS1. Southwestern states that the fact that its crossover point "was the result of Southwestern Bell's attempt to maintain the existing rate relationships is sufficient to rebut the presumption that its proposed DS1 rates are strategically priced."[539] Southwestern goes on to state that "[i]n 1988, Southwestern Bell's strategically priced rates were based on the prices of competitive alternatives rather than any strategic purposes."[540] Thus, Southwestern concludes, it would be inappropriate to require it to recast its rates to comply with the range of reasonableness established by the *Strategic Pricing Order*.

504. Southwestern also argues that its proposed MegaLink Custom DS3 Service rates are reasonable. Contrary to US Sprint's argument, Southwestern states that its proposed rates are not appreciably different from its current ICB DS3 rates. According to Southwestern, the pro-

posed MegaLink rates are based on the same price matrix, with minor adjustments, that it claims was the basis for its ICB rates. Moreover, Southwestern asserts, its proposed rates are consistent with the requirements of the Commission's *Volume Discount Practices Order*. Southwestern asserts that its proposed DS3 rates will be consistently applied to all specific service requests; that the provisions do not contain any restrictions on availability or on the manner in which DS3 service may be used; and that the rates are reasonable and result in efficient services for all users. Southwestern notes that it faces competition in the DS3 market and that its proposed rates are a response to this challenge. Finally, Southwestern argues that the *Strategic Pricing Order* is not applicable to its proposed DS3 rates because, it contends, no direct meaningful price relationship can be established between its DS1 and DS3 services. Assuming that the Order is applicable, however, Southwestern asserts that its DS3 rates are not strategically set because it calculates the DS1 to DS3 crossover point as four to one.[541]

505. Similarly, NYNEX asserts that its proposed DS3 rate structure is justified by competitive necessity. NYNEX states that the rate structure proposed for DS3 service is slightly different from that employed for other Special Access services because DS3 services constitute highly customized serving arrangements tailored to the particular demands of a limited number of sophisticated customers. NYNEX contends that the DS3 market is fully competitive and that its proposed volume and time discounts are required to allow its operating companies to participate in the market. NYNEX also asserts that its rates are consistent with the *Volume Discount Practices Order*.[542] In addition, NYNEX states that its proposed distance-sensitive DS3 channel termination rate structure is reasonable.[543] Moreover, NYNEX contends that its recurring rates do not improperly include non-recurring costs. Non-recurring charges, NYNEX asserts, recover engineering costs which are expensed, but recurring rates properly recover capitalized costs of engineering and installing the service.[544] Finally, NYNEX argues that, for all the same reasons it has advanced to support ICB rates in the past, its proposal to retain ICB treatment for customers that order more than 12 coterminous DS3s is reasonable.[545]

506. BellSouth denies AT&T's assertion that its DS3 rates are strategically set. BellSouth reiterates that all of its proposed rates are cost-based. In addition, BellSouth asserts that AT&T's calculation of a DS1 to DS3 crossover point is misleading. BellSouth states that significant savings are realized on the addition of DS3 channels subsequent to the first, and therefore the crossover point is notably reduced with each DS3 activated. Moreover, BellSouth argues that AT&T has failed to include Outside Plant costs in its analysis of BellSouth's DS3 rates. When these costs are considered, BellSouth asserts, it is clear that its rates are not overstated.[546]

507. Bell Atlantic states that its DS3 rates are based on multiples of the equivalent DS1 rate elements (*i.e.*, channel terminations and channel mileage). The proposed DS3 rates also offer term and volume discounts.[547] Bell Atlantic states that its proposed DS3 rates comply with the *Strategic Pricing Order*. According to Bell Atlantic, the proposed rate for a single DS3 service is less than the rate for three DS3s provided under its proposed DS3C service, and there is thus a reasonable rate-to-cost hierarchy among its DS3 services. Moreover, Bell Atlantic notes, its DS3 service is priced higher than lower cost DS1 service, and thus each member of the high capacity service rate hierarchy is priced in proper register with the underlying costs of the services.[548]

508. Bell Atlantic also asserts that its DS3C rate satisfies the requirements of the *Volume Discount Practices Order*. Bell Atlantic states that the rates for DS3C service provide a reduced rate for volume orders, and that this rate relationship is consistent with the cost characteristics of DS3 and DS3C services.[549]

c. Discussion

509. Based on the foregoing synopsis of the pleadings, it is clear that there is substantial disagreement among the parties as to the meaning of the Commission's *Strategic Pricing Order*.

510. The Commission established a zone of reasonableness for DS1 rates in the *Strategic Pricing Order* that encompasses as its mid-point a crossover point of six voice grade circuits to one DS1 circuit. This crossover point was based on data submitted by NYNEX, which the Commission found to be the best evidence of record as to the cost ratio between voice grade and DS1 circuits of average length. The Commission adopted a presumption[550]

> that a crossover point no more than 30 percent above and below a 6 to 1 ratio, *i.e.*, no more than 8 and no less than 4, 4-wire voice grade circuits to 1 HiCap circuit of average length, does not exceed the range of reasonableness or present significant concerns of strategic pricing.

The Commission added that[551]

> [c]arriers should expect that a failure to provide adequate, persuasive support under the guidelines set forth herein will result in suspension and investigation of the rates, or other appropriate measures.

511. The Commission did not state that LEC-provided multiplexing costs should be included in this calculation. As the LECs have observed, such arguments are more properly raised in a petition for reconsideration of the *Strategic Pricing Order*. Moreover, it is not in all cases clear that petitioners have based their calculations on circuits of average length. Thus, we cannot accept petitioners' arguments that all or most of the proposed DS1 rates exceed the range of reasonableness and trigger the requirement of the *Strategic Pricing Order* that the carrier provide extensive justification for the proposed rates.

512. In two cases, however, we find that carriers have so utterly failed to support their proposed DS1 rates that we must accept petitioners' assertions that the rates exceed the range of reasonableness. First, Southwestern candidly admits, both in its D&J and in its reply, that its proposed DS1 rate is 8.7 times its proposed four-wire voice grade rate. Obviously, this rate exceeds the range of reasonableness and Southwestern's proffered justification is wholly inadequate to rebut the presumption announced in the *Strategic Pricing Order* that such rates are set strategically. Indeed, Southwestern's acknowledgement that it has based its DS1 rates on the existing rate relationships (which, in turn, were based not on costs, but on the prices of competitive alternatives) establishes beyond a shadow of a doubt that the proposed rates are strategically set. South-

western could have supported these rates, at least in theory, by showing that the proposed rates comport with the guidelines established by the Commission.[552] Due to Southwestern's failure to make the required showing, we will apply a rate adjustment factor (RAF) so as to allow to become effective, pursuant to Section 204(b) of the Communications Act, 47 U.S.C. § 204(b), only that portion of the rate which it has justified.[553]

513. In addition, we find that US West has failed adequately to support its proposed DS1 rates. US West mistakenly asserts that we should make any crossover calculations with regard to its target rates, because these are the rates that it would have proposed if it were not transitioning to region-wide rates. This argument does not satisfy the applicable test.[554] We would be obviously derelict if we were to inquire into the reasonableness not of the rates that US West proposes to implement on April 1, 1989, but into the reasonableness of rates that it might propose to implement in July 1990. Although US West applies the same argument to the rates of all its operating companies, the record indicates that only the DS1 rate proposed for MTN exceeds the range of reasonableness.[555]

514. Finally, we note that MCI concludes that the proposed DS1 rates of all the Ameritech operating companies except Wisconsin exceed the range of reasonableness. We will not apply RAFs to these rates, however, because Ameritech has provided an analysis which shows that its rates are within the range of reasonableness.

3. DS3 Terms and Conditions

a. Summary of the tariffs

i. NYNEX Companies

515. Both NYT and NET propose a tariff structure that they assert includes a number of pricing features used by the major competitors in the industry. According to NYT, the proposed structure consists of volume and distance sensitive channel terminations, unbanded channel mileage charges, disaggregated nonrecurring charges, and service discount plans. NYT asserts that its proposed rate structure is similar to the existing Special Access rate structure. NYT notes, however, that changes from previous standard filings include a distance sensitive channel termination measured in quarter mile increments and circuit volume sensitive rates, to reflect cost savings due to technological efficiencies. According to NYT, these efficiencies for DS3 circuits occur after the third circuit and after the ninth circuit ordered. Customers ordering more than 12 circuits between the same two locations will be allowed the choice of using tariff rates for all their circuits, or entering into an agreement which includes the development of rates through an ICB process. NYT states that to satisfy customer requests *above* 12 DS3 circuits, it has to employ "customized designs" to provide for the increased bit capacity. Because of the diversity of these designs, NYT maintains, there is no "reasonable way" for NYT to factor consideration of these customized designs in the development of average rates for DS3 service.[556]

516. NYT proposes a channel termination rate structure with discounts available based on the volume of circuits provided. The channel termination rate is also distance sensitive. NYT further proposes to structure channel mileage into two elements: (1) a fixed charge, standard for all interoffice circuits and unaffected by length; and (2) a charge per mile. NYT will continue to offer DS3 to DS1 multiplexing as a chargeable option for DS3 service on a per arrangement basis. NYT proposes two nonrecurring rates for the provisioning of the DS3 channel termination.[557]

517. NYT and NET offer discounts on DS3 services of 10, 20, and 30 percent for time commitments of 3, 5, and 7 years, respectively. Minimum period requirements and termination liabilities apply to services, subject to discounts. For customers of both NYT and NET, the customer is liable for the full monthly charges for the minimum period (one year) if disconnection is made prior to the end of the minimum period. For customers with commitments longer than one year, both carriers propose to charge 50 percent of the monthly rates for the remaining months of the selected commitment period.[558] NET and NYT also propose to assess full termination liability charges if a DS3 facility is moved to a different building.[559]

ii. Southwestern

518. Southwestern proposes that its customers be liable for a termination charge for the months remaining between the requested termination and the end of the selected "minimum billing period" (12, 36, 60 or 120 months). This charge is "equal to the net present value of all remaining charges, calculated with a discount rate equal to the Telephone Company's interstate special access rate of return as authorized by the FCC at the time of termination."[560]

519. Southwestern proposes a channel termination rate structure with volume discounts based on the number of circuits ordered.[561] However, Southwestern also states that it will continue DS3 service in ICB arrangements when customers order more than 15 DS3 services or greater than 20 miles in distance.[562] Finally, Southwestern proposes to assess 25 percent of the termination liability if a change in the location of one of the customer's designated premises is within the same exchange.[563]

iii. Bell Atlantic

520. Bell Atlantic proposes to establish two distinct DS3 service offerings: an offering of a single DS3 service, and an offering of three DS3 services, called a "DS3C." Both offerings will include channel termination and channel mileage rate elements. Bell Atlantic's proposed channel termination rate structure includes volume discounts based on the number of circuits ordered. A multiplexing option will be offered at eligible Hub offices, to convert a single DS3 to 28 DS1 services. DS3 and DS3C services will be offered under three different rate plans: a month-to-month rate, with a one-year minimum; a fixed price three-year contract; and a fixed price five-year contract.[564]

521. According to Bell Atlantic, the DS3C option addresses customer desires for volume purchases of DS3 service, but still at a volume of service small enough to be feasible for both medium- and large-sized users of special access. Bell Atlantic states that the combination of its various rate elements allows it to address all of the different market segments using a "simple, integrated, nondiscriminatory rate structure." Bell Atlantic notes that all current month-to-month DS3 contracts will automatically be converted to the new rates, unless the customer chooses instead to terminate service.[565]

522. Bell Atlantic proposes to charge a customer who terminates service prior to the end of the commitment period a declining proportion of the monthly charges for the remainder of the commitment period. *See* Section 7.4.13(C). Specifically, for month-to-month service, the customer must pay for 100 percent of the total monthly charges for the minimum period (one year). For customers with either 3 or 5 year commitments, the customer is liable for 100 percent of the monthly charges for the first year if service is discontinued prior to the end of the first year. Further, the customer is liable for 70 percent of the second year, 60 percent of the third year, 50 percent of the fourth year, and 40 percent of the fifth year, as applicable. Bell Atlantic will permit customers to discontinue service without penalty if, rather than terminating, they enter a longer payment plan.[566]

iv. BellSouth

523. BellSouth's tariff offers tariffed DS3 service under Network Service Plans 1 and 2. Under Network Service Plan 1, the customer may order from one to three DS3 circuits. Under Network Service Plan 2, the customer may order from one to 12 DS3 circuits. In either case, the first DS3 local channel is charged at one rate and each additional local channel is charged at a discounted rate. Unlike the other BOCs, BellSouth offers DS3 service only on a month-to-month basis and thus does not offer long-term service discounts. BellSouth offers DS3 channel mileage and point-to-point DS3 service solely on an individual case basis.[567]

v. Pacific

524. Pacific proposes to establish fixed and per mile monthly rates for DS3 service. Pacific's proposed rate structure includes mileage band categories but the channel mileage rates are the same for all bands. Channel Terminations would continue to be provided on an individual case basis, however.[568] Pacific states that it intends to propose averaged DS3 channel termination rates for hubbing arrangements no later than the third quarter of 1989. In addition, Pacific asserts that, if demand for DS3 end office connects grows to the level of of demand for hubbing arrangements, it will propose averaged rates for these channel terminations as well.[569]

b. Petitions

525. Several parties argue that various terms and conditions contained in the BOCs' proposed generalized DS3 tariffs should be rejected or suspended and investigated. US Sprint and MCI contend that the termination liabilities proposed by Bell Atlantic, the NYNEX companies, and Southwestern are inconsistent and not cost-based. US Sprint notes that, while each carrier's termination liability differs, in each case the termination liability increases with the length of the customer's service commitment.[570] Petitioners argue that the termination liabilities for DS3 service should be designed to yield the non-recoverable costs incurred by the carrier to provide service. They contend that a cost-based termination liability should include only those non-recurring costs not recovered by non-recurring charges (NRCs) plus costs of any equipment that is not reusable.[571] Teleport and Diginet also argue that the termination charges are designed to "lock in" customers and prevent or retard the development of a competitive market.[572] Petitioners conclude that the BOCs have failed to demonstrate that the proposed charges are cost-based and that the charges should therefore be suspended and investigated.[573]

526. US Sprint and MCI also argue that various other terms and conditions are either unreasonable or vague and should therefore be rejected or clarified. US Sprint, for example, asserts that it is not clear whether NET would apply NRCs to DS3 facilities which are converted from existing ICB rates to the newly-filed tariffed rates. Bell Atlantic would waive NRCs in such circumstances only if the customer converts within 90 days and Southwestern does not address this situation. US Sprint concludes that NET should clarify that NRCs will not apply when customers convert on the theory that non-recurring costs have already been recovered. US Sprint also argues that Bell Atlantic should permit conversion free from NRCs for at least a year and that Southwestern should be directed to include a conversion option in its proposed offering.[574]

527. Petitioners also object to provisions relating to the use of DS3 facilities for switched service. US Sprint complains that NYT will consider DS3 service to be disconnected and subject to termination liability if the customer requests that all channels be used for switched access service. US Sprint considers this provision, which is unique to NYT, to be unreasonable. In addition, US Sprint and other petitioners object to Bell Atlantic's proposal to require a DS3 customer to pay 25 percent of the tariffed DS3 special access rate even if more than 75 percent of the channels on the DS3 circuit are being used for switched access service (and are thus subject to switched access charges for usage on those channels). US Sprint asserts that this will result in double billing and is unreasonable on its face.[575] Ad Hoc, on the other hand, concedes that the Bell Atlantic provision may not be *prima facie* unreasonable but argues that it raises questions concerning the allocation of the recurring and non-recurring costs of a DS3 facility when mixed use conversion occurs. Ad Hoc also queries whether the remaining price for the DS3 capacity not converted to switched access is sufficient to cover all of Bell Atlantic's costs.[576]

528. US Sprint also argues that the LECs should allow for the installation of DS3 service without requiring that the customer begin paying recurring charges before the service is activated. According to US Sprint, both carrier and customer would realize significant efficiencies.[577] In addition, US Sprint contends that the "draconian" charges for moves of DS3 service to a different customer location are unreasonable.[578] US Sprint also finds other deficiencies in the proposed DS3 provisions.[579]

529. MCI also contends that various provisions are unreasonable and ambiguous. MCI states that, although NYT, NET, and Southwestern propose to implement distance sensitive rate structures for channel terminations, "these LECs do not provide cost schedules documenting the additional investment that must be recovered in the recurring portion of the channel termination mileage."[580] MCI also states that the LECs have not filed Vertical and Horizontal (V&H) coordinates for measuring the mileage from the customer premises to the serving wire center, making it difficult if not impossible accurately to measure the distance. MCI concludes that the distance sensitive channel termination rate structure is unjust and unreasonable and impermissibly vague.[581] Finally, MCI asserts that ICB pricing for high volume customers is unreasonably discriminatory.[582]

c. Replies

530. Bell Atlantic asserts that its long term arrangements and associated termination liability provisions are necessary and reasonable. According to Bell Atlantic, it agrees to provide rate stability in exchange for the customer's commitment to utilize the service for an extended period. If the customer violates its agreement, the termination liability provision permits Bell Atlantic to recoup a portion of the revenues lost thereby. Bell Atlantic notes that its competitors offer similar long-term arrangements and are merely attempting to obtain a competitive advantage. Bell Atlantic asserts that many customers require rate stability for DS3 service and that its proposed service arrangements are a response to this requirement.[583]

531. In addition, Bell Atlantic asserts that the Commission has recognized that a termination charge based on lost revenues is appropriate in the case of a long-term arrangement. According to Bell Atlantic, US Sprint's position would relieve the customer of any responsibility and would make the agreement totally one-sided. Bell Atlantic defends its sliding scale of charges for terminations as a simplified approach to recognizing the time value of money. Next, Bell Atlantic argues that its one-year minimum service period is consistent with practices in the market for DS3 service and that this provision is needed to allow the company to recover the installation costs associated with the service.[584]

532. Finally, Bell Atlantic argues that its effective termination provision is needed to ensure that costs are recovered when customers "ratchet" DS3 service and to ensure that similarly situated customers are treated fairly. Bell Atlantic notes that customers can avoid the effects of this provision by ordering month-to-month DS3 service (subject to the minimum one-year service term) or switched access. According to Bell Atlantic, this provision will accommodate virtually all current cases of ratcheting and thus will discourage inefficient use of Bell Atlantic's facilities without disturbing legitimate uses of DS3 service.[585]

533. NYNEX and Southwestern offer explanations of various terms and conditions that MCI and US Sprint argue are ambiguous or unsupported. NYNEX explains that NRCs do not apply to conversion of ICB DS3 services to tariffed rates but that termination charges will apply to any cancellation of service prior to the expiration of the commitment period. NYNEX also explains that a customer ordering DS1/DS3 multiplexing would pay only one DS3 channel termination rate element and that volume discounts apply to all coterminous DS3 circuits, regardless of when they are ordered. Volume discounts are not applied to the channel mileage rate element, however, as the efficiencies in interoffice DS3 transmission are already shared among all subscribers and are reflected in the proposed rates. Finally, NYNEX proposes to clarify that termination charges would not apply if a customer moves a DS3 circuit to another location as long as this allows the LEC to re-use the investment in serving the new location.[586]

534. Southwestern also asserts that its proposed MegaLink Custom Service termination liability and move charges are reasonable and merely ensure that both parties receive the benefit of their bargain. Southwestern also asserts that similar charges are assessed by other carriers, such as AT&T, and that they permit the carrier to recoup the costs involved with service termination and rearrangement.[587] Southwestern further states that its proposed DS3 rate structure is entirely distance sensitive and that there is no channel termination rate element. Southwestern states that the lack of V&H coordinates in its tariff is not a problem due to the sophisticated nature of DS3 customers and that to file coordinates for customer premises would be burdensome.[588]

535. Southwestern also contends that various provisions relating to provision of ICB DS3 service are reasonable. First, Southwestern argues that its ICB case preparation charge is reasonable because there is no installation charge for ICB service and the recurring charges do not recover unusual handling costs associated with ICB service. Southwestern also contends that its discounted DS3 rates recover their costs and are not anticompetitive, noting that, in competitive markets, time is traded for money. Southwestern asserts that its lower monthly rates for longer service periods respond to marketplace expectations and are generally consistent with Southwestern's cost experience. In addition, Southwestern asserts that its proposed ICB pricing of orders of 15 or more DS3 services is not unreasonably discriminatory. Southwestern states that it has proposed this treatment because of insufficient demand and a lack of experience with this volume of service. However, Southwestern states, its pricing procedure for such ICB DS3 services will be consistent with the procedures used for tariffed DS3 services. Southwestern notes that conversion from ICB to tariffed DS3 service is permissible. Southwestern describes an administrative practice that it has followed to permit customers to increase their time and volume commitments and offers to tariff this procedure.[589]

536. Finally, Southwestern states that various terms and conditions of its proposed MegaLink Custom offering are not vague, as MCI and US Sprint have alleged. Southwestern argues that, read in context with other tariff provisions, the intent of the disputed tariff provisions is clear.[590]

d. Discussion

537. We have previously observed that the BOCs' existing practice of offering DS3 service exclusively on an individual case basis may be unlawful. These questions are currently being examined in our pending investigation in Docket 88-136. Although we believe the proposed tariffs before us here represent an important step forward in this regard, we find that they do not completely resolve the concerns that prompted us to institute that investigation and may present other questions that warrant investigation. We therefore include the proposed DS3 tariffs of Bell Atlantic, BellSouth, NYNEX, Pacific, and Southwestern in the investigation in Docket 88-136. We will issue an Order designating issues for investigation and establishing a pleading cycle in the near future. We note, however, that our investigation of the Bell Atlantic tariff will be limited in scope for the reasons discussed below.

538. The most obviously troubling aspect of the proposed DS3 tariffs is the carriers' continued reliance on ICB pricing. In particular, we note that all five of these carriers propose to "grandfather" existing ICB DS3 services so that these existing ICB service would not be affected by the establishment of a general offering. Moreover, even some of the BOCs that have proposed to implement, on a going forward basis, what purportedly are generalized tariffs for DS3 service propose to continue to use ICB rates in certain circumstances.

539. Obviously, if our Docket 88-136 investigation concludes ICB pricing is unlawful, these provisions would also be affected. We therefore conclude that these provisions must be examined in the ICB investigation. We note that Bell Atlantic does not propose to use ICB rates except for those services that have already become effective pursuant to ICB proposals. With regard to Bell Atlantic, therefore, we will limit our investigation to the reasonableness of continuing ICB rates for those services. We are taking this step with regard to the Bell Atlantic tariff because we have reached the view, based upon the present record, that the Bell Atlantic tariff constitutes a suitable rate structure for a general DS3 offering. The tariff appears sufficiently general in scope because it applies general rates to both channel termination and channel mileage elements and it avoids the inclusion of any ICB arrangements under the guise of a purportedly general offering. For these reasons we have found it possible to limit the scope of the DS3 investigation as it applies to Bell Atlantic. BellSouth's tariff also includes an averaged rate structure for DS3 local channels. However, under BellSouth's tariff DS3 channel mileage is provided on an individual case basis.[591] This provision is therefore included in our investigation in Docket 88-136.

4. Miscellaneous Issues

a. Petitions

540. Ad Hoc contends that Illinois has understated HiCap revenues by $1.7 million. Ad Hoc states that Illinois used lower figures in computing its HiCap interoffice mileage revenues than in calculating demand.[592] Finally, the Networks assert that Ameritech and BellSouth have used flawed ratemaking procedures for Video Service, but the Networks do not request that the rates be suspended or investigated.[593]

b. Replies

541. In response to Ad Hoc's contention concerning Illinois's HiCap interoffice mileage revenues, Ameritech states that its erratum filing corrected this discrepancy. Ameritech states that its revenue data now correspond with demand data used in the rate development process.[594] Finally, both Ameritech and BellSouth respond to the Networks' arguments concerning rates for Video Service.[595]

c. Discussion

542. We are satisfied that the inconsistency in interoffice mileage revenues identified by Ad Hoc has been adequately addressed by Ameritech and that no action is required at this time. Moreover, the Networks petition presents no basis on which to suspend or investigate the proposed Video Service rates of Ameritech and BellSouth.

I. *Other Issues*

1. Compliance with Part 69 Compliance Order and Orders in CC Docket No. 88-1

a. Petitions

543. AT&T argues that several LECs have failed to implement the *Part 69 Compliance Order* [596] regarding allocation of Accounts 2002 and 2003. AT&T maintains that failure to implement this allocation results in underallocation of costs to common line and overallocation of costs to transport.[597] In its comments regarding the LECs' errata filings, AT&T asserts that BellSouth has failed to implement the *Part 69 Compliance Order* regarding allocation of Account 6620 – All Other Customer Service Expenses. AT&T requests that the Commission require BellSouth to exclude Account 6610 – Marketing Expenses from the allocator for Account 6620. AT&T asserts that failure to implement this change leads to underallocation of costs to non-access and overallocation of costs to access.[598]

544. ARINC observes that shortly before the LECs filed their annual 1989 access tariffs, the Commission released its *Part 69 Compliance Order* and its *Docket 88 - 1 Order*.[599] ARINC notes that the *Part 69 Compliance Order* (1) revised the phase-out schedule for the LS1 discount; (2) determined that the investment in Accounts 2002 and 2003 should be allocated on the basis of TPIS rather than associated investment; and (3) clarified that the LECs should exclude the amounts in Accounts 2004 and 2005 from net investment.

545. ARINC further notes that the *Docket 88 - 1 Order* similarly ordered several disallowances of the carriers' revenue requirements, and directed the carriers to file tariff revisions to current rates, to file refund plans, or to modify their 1989 filings to reflect the disallowances. ARINC observes that several carriers claim they have not had ample opportunity to make adjustments to reflect the *Part 69 Compliance Order* and the *Docket 88 - 1 Order*, that the resulting changes were so negligible as to be unnecessary, or that they would not make the changes until they have exhausted all legal remedies to vacate the disallowances. ARINC argues that the Commission should direct carriers to revise their 1989 filings to include the changes mandated by the above-referenced Orders.[600]

b. Replies

546. Most carriers assert that they have submitted adjustments in their errata filings to account for the changes mandated in the *Part 69 Compliance Order*.[601] BellSouth argues that AT&T has misconstrued its documentation and contends that it adjusted its interstate revenue requirements to reflect the changes made by the *Part 69 Compliance Order*. BellSouth notes, however, that its TRP data does not reflect the amended rules due to time constraints.[602]

547. In addition, Ameritech notes that the *Docket 88 - 1 Order* was released shortly before the LECs were due to submit their access tariff filings, and asserts that it has properly followed the procedures delineated by the Commission for subsequent adjustments.[603] BellSouth likewise argues that it has adjusted its filing consistent with the *Docket 88 - 1 Order*, but asserts that it will be deprived of revenues for expenses actually incurred if it is required to make the refunds ordered by the *Docket 88 - 1 Order*.[604] NYNEX argues that the Commission has stated that the *Docket 88 - 1 Order* required that the LECs file refund plans by January 6, 1989, but did not require that they actually make refunds by that date.[605] Furthermore, NYNEX asserts, it would be premature for the Commission to order the LECs to implement their refund plans until it has issued a final order on reconsideration.[606]

c. Discussion

548. As the LECs have noted, the errata filings adequately reflect changes imposed by the *Part 69 Compliance Order*. While AT&T is correct that marketing expenses should be excluded from the allocation of Account 6620, AT&T has not indicated how it determined that BellSouth failed to exclude such expenses. Nor has AT&T provided information necessary for the Bureau to analyze how it performed its calculations. Accordingly, the petitions of AT&T and ARINC are denied to the extent that they question the LECs' compliance with the *Part 69 Compliance Order*.

549. In addition, ARINC has not documented any persuasive basis for the Bureau to impose conditions in this Order for compliance with the *Docket 88 - 1 Order*. Further Orders in Docket 88-1 will address the obligation of carriers to comply with that Order. ARINC's petition regarding this issue is therefore denied.

2. New England Telephone "O-Minus Passthrough" Rates

a. Petitions

550. AT&T argues that NET's proposed 19.7 percent increase in its 0-Minus Passthrough rates is excessive. AT&T notes that NET projected a 52 percent increase in its Customer Operations Services expense from August 1988 to December 1988 and notes that Customer Operations Service expense accounts for virtually all of the revenue requirements attributable to 0-Minus Passthrough service.[607]

b. Replies

551. NYNEX asserts that the $2.7 million increase in NET's 0-Minus Passthrough rates is justified based on updated separations data. NYNEX argues that AT&T provides no documentation in support of its calculations, and argues that its own method of calculation has been approved by the Commission.[608]

c. Discussion

552. On January 31, 1989, the Bureau released an Order denying a petition to suspend and investigate 0-Minus Passthrough rates filed by NYNEX on August 15, 1988.[609] While those rates were based on data from the first four months of 1988, the increased rates NYNEX filed on December 30 reflect the full PYCOS period. Therefore, the December 30 rates do not represent an unreasonable increase in the underlying revenue requirements over four months, but have been updated, using the same method of calculation that was used for the current rates. In its comments regarding the carriers' errata filings, AT&T notes that NYNEX, in response to the *Part 69 Compliance Order*, has proposed an additional increase in its companies' 0-Minus Passthrough rates, and argues that that Order should have no effect of the 0-Minus Passthrough rate element. AT&T requests that the Commission suspend and investigate the proposed increases.[610]

553. The Bureau has reviewed the tariff filings, AT&T's petition, the NYNEX reply comments, the NYNEX errata filing, and AT&T's comments regarding the errata filing. We find that no compelling argument has been presented that the 0-Minus Passthrough rates filed by the NYNEX companies warrant investigation at this time. AT&T's petition is therefore denied to the extent that it addresses this issue.

3. Projected Uncollectibles

a. Petitions

554. AT&T asserts that several carriers have, without justification, based their revenue requirements on uncollectible ratios which are considerably higher than historical levels.[611] In its comments regarding the carriers' errata filings, AT&T notes that Pacific, Ameritech (Illinois Bell), and Southwestern (Texas) have reduced their uncollectible revenues. AT&T contends, however, that the carriers' projections are still overstated.[612]

555. Similarly, MCI argues that many LECs have, without explanation, increased uncollectible revenue adjustments "beyond reason."[613] US Sprint also asserts that the LECs' predicted increase in uncollectibles is unwarranted. US Sprint argues that the Commission has stated that, absent extraordinary circumstances, "'a more than threefold increase in the uncollectible rate in a single year,' would be unacceptable."[614] Moreover, US Sprint contends, uncollectibles should have decreased from 1988 to 1989 due to the increase in Lifeline assistance programs and improvements in the LECs' billing systems. US Sprint maintains that the Commission should limit the LECs to the 1988 uncollectible rate unless they can justify the higher rate.[615]

b. Replies

556. Ameritech notes that it has revised Indiana Bell's PYCOS uncollectible common line revenues to show a 22 percent decrease from 1988 levels.[616] For Illinois Bell, however, Ameritech argues that its projected increases are supported by historical trends. Ameritech notes that its projections differ from those of AT&T and MCI because it used eight months' actual data, as permitted in past access tariff proceedings, while AT&T and MCI used a nine-month PYCOS period.[617] BellSouth submits that it mistakenly understated the historical amount of uncollectibles in its initial filing and will correct the amount in its errata filing.[618] Cincinnati similarly concedes that it reported an overstated prospective CL uncollectibles amount, but contends that it used the correct figure in calculating its revenue requirement.[619]

557. NYNEX contends that the total CL uncollectibles should increase in 1989 as the proportion of end user revenues to total CL revenues increases with the end user charge. NYNEX further argues that NET experienced increased actual carrier uncollectibles in 1988 due to the bankruptcy of a Massachusetts-based IC, and contends that its higher uncollectibles factor for Massachusetts accounts for the fact that several small, new carriers are located in Massachusetts. NYNEX additionally notes that uncollectibles for the total of all access categories in Massachusetts has decreased.[620]

558. Nevada argues that it has not projected an increase in its uncollectible revenues for the 1989 test year and also deems unfounded US Sprint's assertion that increases in Lifeline assistance should reduce the amount of uncollectibles associated with non-payment of end user charges. Nevada argues that US Sprint ignores the fact that the common line charges to end users not eligible for Lifeline assistance increased in December 1988 and will

increase again on April 1, 1989. Nevada submits that uncollectibles associated with these charges will increase so as to offset any reduction in uncollectibles associated with Lifeline customers.[621] Pacific submits that its .03 percent increase in uncollectible revenues is reasonable.[622] Southwestern argues that it has not overestimated its uncollectible ratio in Texas, and notes that because the floundering Texas economy has damaged the financial stability of many ICs, the uncollectible factor can be expected to trend upward since realized uncollectibles lag downturns in economic performance.[623]

559. US West contends that its uncollectibles projection is not excessive. US West asserts that since uncollectibles are recovered through regional rates, study area overstatements do not result in overearnings for total company uncollectibles when other study areas are understated.[624] GTOC asserts that its uncollectible revenue adjustments for Indiana and Alabama were justified in light of the amount of data available at the time of GTOC's filing, but submits that more current data portend that AT&T's proposed uncollectible levels are more appropriate. GTOC asserts that the adjustment is *de minimis*, however, and should be made later, if at all, as a mid-course correction.[625] NECA argues that MCI's proposed reduction of NECA's uncollectible forecast fails to account for the time lag between the billing of a customer and recognition that the amount assessed is uncollectible.[626]

c. Discussion

560. Uncollectible revenues are included in interstate revenue requirements to reflect properly billed revenues that cannot be collected, and are most accurately projected via reference to historical data. If a carrier predicts a change in its rate of uncollectibles, that carrier should provide justification detailing the basis for the change as well as its method of calculating the projected amount. The Bureau has reviewed the tariff filings, the petitions of AT&T, MCI, and US Sprint, the carriers' reply comments, the carriers' errata filings, and the petitioners' comments regarding the errata filings, and we believe that the uncollectible amounts opposed by the petitioners have been properly justified. The petitions are therefore denied to the extent that the petitions relate to uncollectible revenues, except that GTOC should modify its uncollectible amounts as proposed in its reply comments. GTOC should decrease its uncollectibles in Indiana by $653,000 and in Alabama by $248,000. AT&T's petition is therefore granted to the extent that it proposes this correction and is otherwise denied.

4. Federal Income Tax Expenses

a. Petitions

561. AT&T argues that some carriers have understated the investment tax credit (ITC) amortization used to calculate test year federal income tax (FIT) expense, leading to overstatement of interstate revenue requirements. AT&T reached this conclusion by comparing growth between the 1988 historical and 1989 test periods, and notes that these companies also understated their 1988 ITC amortization estimates. Specifically AT&T asserts that (1) Ameritech (Michigan Bell) overstates its FIT expense by $422,000 and overstates its revenue requirements by $640,000; (2) Bell Atlantic (C&P) overstates its FIT expense by $1,846,000 and overstates its revenue requirements by $2,797,000; (3) NYNEX (NYT) overstates its FIT expense by $1,353,000 and overstates its revenue requirements by $2,050,000; and (4) US West (PNB) overstates its FIT expense by $830,000 and overstates its revenue requirements by $1,258,000.[627]

b. Replies

562. Ameritech opposes AT&T's claim that Michigan Bell understated the amount of ITC amortization used in the calculation of its test year FIT expense. Ameritech argues that while the method of calculation used by AT&T involved a high level of disaggregation and produced a rough estimate, Ameritech's Fixed Asset Tax System (FATS) is more accurate. Ameritech also contends that the ITC amortization amount can be expected to decline each year, since the investment tax credit was repealed by the Tax Reform Act of 1986 with respect to property placed in service after December 31, 1985. Ameritech also maintains that its FATS system returns the benefits of ITC to ratepayers consistent with the normalization rules of the Internal Revenue Code. Ameritech believes that the higher amortization amount proposed by AT&T could cause Ameritech to violate those rules.[628]

563. Bell Atlantic contends that it did not understate projected ITC amortization, but asserts that several accounts that were previously available for ITC application have become fully amortized, thus reducing amortization reserves. Moreover, Bell Atlantic argues, Maryland previously applied a single ITC amortization rate to all vintages within an account while the other companies used vintage sensitive ITC amortization rates. Bell Atlantic notes that Maryland has begun using vintage sensitive ITC amortization rates, contributing to the decrease in the amortized ITC available for 1989. Bell Atlantic asserts that AT&T's method of calculating the proper ITC balances is flawed because it failed to account for these one-time occurences.[629]

564. NYNEX submits that AT&T is correct that NYT has overstated its 1989 FIT expense by underestimating its ITCs and has corrected the error in its errata filing. NYNEX contends, however, that AT&T has overstated the effect of the error on revenue requirements. NYNEX states that NYT has increased its 1989 ITC amortization forecast from $51.7 million to $55.3 million, thus decreasing its revenue requirement by $1.5 million.[630]

565. US West asserts that AT&T used the Chart COS-1 (H) amount in its evaluation of PNB's forecasted ITC amortization. US West submits that the source for its historical COS report was Account 7210, which includes Accounts 7210.1 and 7210.2. Account 7210.1, US West avers, records realized and recaptured ITC. US West contends that Account 7210.1 was properly excluded from its 1989 filing but was included in the historical reports, thereby creating the perception that the prospective ITC amortization amounts for PNB were understated. Moreover, US West states, if AT&T had used the actual amount booked in Account 7210.2 at the year's end, $19,527,000, it would have found that PNB's ITC amortization declined by less than 12 percent.[631]

c. Discussion

566. We believe that the test performed by AT&T in determining an understatement of the 1989 ITC amortization amounts for Ameritech (Michigan Bell), Bell Atlantic (C&P), NYNEX (NYT), and US West (PNB) is

persuasive and requires certain revenue requirement adjustments. AT&T developed a 1989 unamortized ITC balance available for amortization by subtracting the 1988 annualized ITC amortization on Chart COS-1 (H) from the actual unamortized ITC balance as of December 31, 1987, listed on Form M. AT&T then developed its projection of each carrier's 1989 ITC amortization by multiplying the 1989 unamortized ITC balance available for amortization by the effective rate of amortization used by each carrier in 1988. AT&T then computed each carrier's understatement of total company ITC amortization by subtracting the company's ITC amortization amount shown on its 1989 Chart COS-1(P) from AT&T's projection of that company's 1989 ITC amortization. Finally, AT&T developed an interstate amount of ITC understatement by multiplying the total company understatement by an interstate factor derived from the carrier's Chart COS-1(P).

567. AT&T's test indicates that Ameritech (Michigan Bell) has understated interstate ITC amortization by $422,000, which overstates interstate FIT expense by the same amount. The interstate revenue requirement impact of this FIT expense overstatement is $640,000. The Bureau is not convinced that Ameritech's FATS system is more accurate than AT&T's method. We assume that Ameritech used FATS to compute Michigan Bell's 1988 forecasted amortization, which was 17.7 percent too low. Moreover, we do not believe that the repeal of the ITC has any effect on AT&T's calculations, since AT&T did not add new ITCs to its projected 1989 unamortized ITC balance available for amortization. Accordingly, we direct Michigan Bell to reduce its interstate revenue requirements by $640,000.

568. AT&T's test also indicates that Bell Atlantic (C&P) has understated interstate ITC amortization, and thus has overstated FIT expense, by $1,846,000. The interstate revenue requirement impact of this FIT expense overstatement is $2,797,000. We are not convinced by Bell Atlantic's argument that AT&T's method of calculating unamortized ITCs available for 1989 is flawed because it did not account for the loss of several accounts which were fully amortized in 1988. AT&T's test would have taken the loss of these accounts into consideration, since the 1988 amortization was deducted from the C&P companies' December 31, 1987, unamortized ITC balance. Furthermore, Bell Atlantic has provided no data to indicate how much their unamortized ITC balances would decline as a result of the change in amortization methods in Maryland. Accordingly, we direct the C&P companies to reduce their revenue requirements by $2,797,000.

569. Additionally, AT&T's calculations indicate that US West (PNB) has understated interstate ITC amortization, and therefore has overstated interstate FIT expense, by $830,000. As a result, US West has overstated PNB's interstate revenue requirements by $1,258,000. We do not agree with US West that AT&T's method of calculation was flawed because it relied on data in the COS historical report which included realized and recaptured ITC. AT&T's test states that realized investment tax credits net of recapture would have an immaterial impact, and US West has not provided information to the contrary. Moreover, we are not persuaded by PNB's argument that had AT&T used PNB's actual ITC amortization year end amount, PNB would have satisfied AT&T's 12 percent tolerance test. Substituting PNB's actual amount recorded in Account 7210.2 of $19,527,000 for the Chart COS-1(H) figure used by AT&T, we recalculated the percentage by which PNB's ITC amortization declined for the 1989 test year when compared to the 1988 actual amount. This recalculation showed that PNB would still fail the 12 percent tolerance test since its 1989 test year ITC amortization declined by 18 percent when compared to actual 1988 data. Accordingly, we direct PNB to reduce its revenue requirements by $1,258,000.

570. In an errata filed on January 31, 1989, NYT increased its forecast of ITC amortization by $3.6 million, which reduced its interstate revenue requirements by $1.5 million. The Bureau believes these modifications are reasonably accurate. As a result, no further action is necessary.

5. Equal Access Revenue Requirement

a. Petitions

571. AT&T contends that unexplained growth in Pacific's Total Plant in Service (TPIS) and Unamortized Deferred Expenses may indicate that it inappropriately included the costs of implementing 800 Database service. AT&T notes that Pacific's 1988 equal access revenue requirement included such costs, which the Bureau ordered removed.[632] AT&T argues that New York Telephone may also be including ineligible costs in the development of its equal access revenue requirement. AT&T notes that New York Telephone's workpapers identify a 24 percent growth in TPIS. AT&T observes that New York Telephone has attributed these expenditures to its accelerated equal access conversion schedule, but argues that some offices scheduled for switch replacement during 1989 were already converted via adjunct technology in 1988. AT&T asserts that only initial implementation costs are eligible for inclusion as equal access costs for separations purposes.[633]

b. Replies

572. NYNEX asserts that New York Telephone has not included the cost of any switch replacements planned in 1989 for central offices already converted to equal access in 1988 via adjuncts.[634] Pacific maintains that it did not include any 800 Database Service costs in the equal access category and that AT&T has miscalculated.[635]

c. Discussion

573. The Bureau has reviewed the Pacific and NYNEX tariffs, AT&T's petition, and the carriers' replies. AT&T has made no compelling argument that the carriers' stated equal access revenue requirements are so patently unlawful as to require rejection, nor is investigation warranted at this time. AT&T's petition is therefore denied regarding this issue.

6. Equal Access Current Period Expenditures

a. Petitions

574. AT&T argues that current period expenditures are not sufficiently supported by the summary account detail of the LECs' workpapers. AT&T asserts that Indiana Bell has claimed a 13 percent growth in TPIS despite no current period expenses nor identifiable conversions. AT&T notes that while Ameritech (Indiana Bell) has identified an increase in the total number of converted lines, many of those lines appear to be related to the

growth in total subscriber lines. AT&T therefore requests that the Commission direct Indiana Bell to substantiate its investment expenditures in 1989 as those required for initial equal access for the test period. AT&T also contends that Michigan Bell and Ohio Bell each incorrectly includes investments in Plant Under Construction -- Long Term in the development of its equal access rate base.[636]

575. In addition, AT&T contends that Bell Atlantic has not adequately supported its claim that $1 million will be spent in the test period for equal access in Washington, D.C., since most of the new presubscribed lines in the test period are attributable to growth in total subscriber lines. AT&T also maintains that Bell Atlantic indicates that it will have equal access expenses in Pennsylvania and Delaware even though both of those states have already been totally converted.[637]

576. AT&T further deems it unclear whether the $595,000 C&WF investment identified by BellSouth as associated with equal access implementation is appropriately assigned to the Equal Access category. In addition, AT&T asserts that NET incorrectly includes investments in Plant Under Construction -- Long Term in the development of its rate base and should be required to adjust its rate base to rectify the error. AT&T also observes that NYT and NET improperly include the costs of repairs, rearrangements, and changes to the investment in their plant-specific expenses.[638]

577. AT&T additionally contends that Pacific's depreciation reserves are understated since they amount to only 10.6 percent of TPIS. AT&T further asserts that because of the summary nature of Southwestern's ACAS Part 69 Cost Allocation Report, it is not possible to identify how much of certain total company C&WF amounts included in the calculation of equal access plant investment were assigned to the interstate rate base. AT&T maintains that because the amounts are not separated into specific C&WF categories, it is unclear how these investments are directly associated with the implementation of equal access. AT&T further asserts that Southwestern should substantiate the several expenditures it has identified as equal access implementation since its cost support indicates little or no change in lines converted during the test period.[639]

578. In addition, AT&T contends that US West has included 1989 capital expenditures for PNB that are not substantiated by any showing of conversions during the period. AT&T submits that such expenditures should be removed from PNB's revenue requirement. AT&T also argues that US West identifies current 1989 expenses and capital expenditures for MTN and NWB which appear overstated given the small number of lines scheduled for conversion during the test period. AT&T submits that the Commission should require US West to substantiate these amounts as initial equal access implementation costs.[640]

b. Replies

579. Ameritech denies AT&T's contention that Michigan Bell and Ohio Bell have improperly included investments in Plant Under Construction -- Long Term in the development of their equal access rate bases. Ameritech argues that these amounts were stated as disallowances from the companies' rate bases, but acknowledges that these disallowances are not readily apparent from the companies' filings and are spread over several different interstate cost categories. As a result, Ameritech notes, even though the total interstate access rate bases were properly developed, the equal access portions are slightly overstated while the non-equal access portions are slightly understated. Ameritech submits, however, that this error need not be corrected since it would have a marginal impact on the revenue requirement.[641]

580. Bell Atlantic argues that its current period equal access expenses less depreciation for the test year are appropriate, since expense levels do not necessarily coincide with the timing of equal access conversions.[642] BellSouth contends that it properly included $595,000 C&WF investment in its equal access rate base since that amount represents facilities placed for the initial provisioning of equal access.[643] NYNEX opposes AT&T's allegation that it includes costs of repairs, rearrangements, and changes to investment associated with equal access in its equal access revenue requirement, and that it incorrectly includes $133,865 of investment in Plant Under Construction -- Long Term. NYNEX asserts that it did not include the costs cited by AT&T, but concedes that the $133,865 was inadvertently allocated to equal access. NYNEX submits that this error leads to a *de minimis* overstatement of its EACR revenue requirement which does not necessitate modification of its access charges.[644] In addition, Southwestern argues that it has properly included C&WF investment in its calculation of equal access investment.[645]

581. US West asserts that AT&T improperly calculated PNB's equal access plant in service growth for 1989. US West concedes, however, that the additional Equal Access Interstate TPIS for MTN and NWB is overstated, and that it overstated MTN's associated Depreciation Reserve. US West asserts that the net revenue requirement impact of these overstatements is $0.5 million and that it will make the corrections at a later date. US West disagrees with AT&T's assertion that 1989 current Equal Access expenses for its operating companies are overstated, and argues that the 1989 figure is consistent with prior years' expenses.[646]

c. Discussion

582. We conclude that Ameritech must correct the errors it cites in the interstate access rate bases for Michigan and Ohio, namely its overstatement of the equal access portions and its understatement of the non-equal access portions. Michigan is directed to reduce its equal access revenue requirement by $204,000. Ohio is directed to reduce its equal access revenue requirement by $72,000.[647] Ameritech has admitted that these revenue requirements are overstated and therefore must make the appropriate adjustments. We conclude, however, that on the record before us, Ameritech has not adequately supported the increases of $190,000 and $68,000 in Michigan and Ohio's respective total access revenue requirements that it now claims are warranted. We emphasize that, for purposes of the refiling required by this Order, Ameritech should not seek to increase these revenue requirements by these amounts. Furthermore, NYNEX should remove the $133,865 Plant Under Construction --Long Term investment it concedes was incorrectly included in EACR, and US West should reduce its revenue requirement by $0.5 million.

583. The Bureau is not persuaded by AT&T's other arguments regarding the carriers' current period equal access expenditures. AT&T's petition is granted to the extent discussed above and is otherwise denied.

7. Inconsistencies and Missing Data in LEC Data Reports

a. Petitions

584. AT&T asserts that the LEC TRPs contain several data flaws. AT&T argues that certain TRP data is missing, and cites inconsistencies among some carriers' TRP charts.[648]

b. Replies

585. While the LECs do acknowledge some errors, they generally defend their data submissions as consistent with the *Cost Support Order* and the *Waiver Order*.[649] For example, several carriers assert that the apparent inconsistencies among Charts COS-1, COS-7, and COS-8 exist because Chart COS-7 data is reported according to Part 32 of the Commission's Rules, while Chart COS-8 data requires reference to Part 36.[650]

c. Discussion

586. In its comments regarding the LECs' errata filings, AT&T claims that several carriers have failed to provide the required Chart COS-6 and that this prevents verification of their compliance with the Commission's Part 36 Rules. AT&T also argues that Bell Atlantic and Ameritech have failed to provide the non-access information for Chart COS-8, historical and prospective, while Pacific has failed to provide the information for the historical chart. AT&T contends that this prevents verification that the Billing and Collection and Interexchange amounts have been correctly removed from access.[651]

587. We agree with AT&T that the LECs have submitted incomplete Chart COS-6 and Chart COS-8 data. The *Cost Support Order* noted, however, that Chart COS-6 is a new chart, while Chart COS-8 requires data for different periods than required for the corresponding quarterly and annual ARMIS submissions. We also permitted carriers to provide their own separations studies in place of Chart COS-6 as long as those studies are substantively equivalent to that chart.[652] For these reasons, while we find that the data submitted by some carriers is so inadequate as to inhibit review by the Commission and by the petitioners, we will not require that the LECs file additional data at this time. If we later deem the missing information necessary, the carriers must be prepared to furnish it. Because we are developing standard charts which we expect all carriers to use next year, we emphasize that the exceptions made to the data requirements for this year's TRP charts are germane only to this year's proceeding.

8. New England Telephone 800 Access Service

Customer Identification Charge

a. Petitions

588. MCI asserts that NET plans to raise its 800 Access Service Customer Identification Charge (CIC) from $0.0001 to $0.0002 without justification. MCI asserts that this is a 100 percent increase and should not be allowed absent cost support.[653]

b. Replies

589. NYNEX asserts that it has included cost support for NET's proposed increase in the CIC, and notes that the doubling of the rate is not unwarranted considering the relatively small amount of cost associated with this rate element.[654]

c. Discussion

590. NET's CIC increase does not warrant investigation at this time. MCI's petition regarding this issue is therefore denied.

9. Non-Recurring Charges

a. Petitions

591. MCI asserts that several carriers have failed to provide adequate cost support for their non-recurring charges (NRCs) or have used ineffective methods to estimate costs. MCI submits that Bell Atlantic has not provided a new cost study to justify its 89.92 percent Local Transport increase, and argues that Bell Atlantic has failed to provide data to substantiate several other NRC increases. MCI further asserts that Bell Atlantic should be required to develop a first and additional rate structure for special access non-recurring charges because its present rate structure does not incorporate the fact that installation of multiple circuits generates economies of scale (*i.e.*, additional circuits cost less to install than the first circuit because the incremental costs are lower).[655]

592. MCI also argues that Southwestern has proposed to raise its NRCs without proper justification. MCI observes that Southwestern relied on a prior year's cost study to estimate the time involved with each non-recurring function and then increased the applicable labor rates. MCI contends, however, that because these increases are excessive and have not been adequately supported, the NRC increases should be suspended. For example, MCI argues, Southwestern's NRCs for its Digital Data Service 4.8 Kbps have inexplicably increased in Missouri and Texas. MCI further asserts that GTOC proposes unreasonable and unjustified increases in its special access NRCs.[656]

593. In addition, MCI argues that Ameritech developed new switched access NRCs using data obtained through a 1988 time-oriented cost (TOC) study which produced excessive rates. MCI notes that the study consisted of a poll of employees to determine the length of time they spend on certain non-recurring tasks. MCI argues that the samples used were too small to yield accurate results and that Ameritech failed properly to eliminate results which substantially deviated from the norm. MCI argues that Ameritech's method, which elicited minimum, maximum, and "most likely" estimates of time from employees, should be altered so as to average the "most likely" responses within a given standard deviation and discard all others.[657] MCI observes that NYNEX, Pacific Telesis, Southwestern, US West, and BellSouth have also used the method of calculation presented by Ameritech. MCI submits, however, that these proposed NRC increases should be allowed to take effect pending the outcome of a Commission review of this costing method.[658]

594. LOCATE asserts that several BOCs propose significant reductions in the NRCs associated with DS1 service. LOCATE surmises that the NRC reductions are designed to obtain an advantage in competitive markets and concludes that the rate reductions should therefore be rejected.[659] Ad Hoc argues that Pacific has overstated the

time required to perform installation and service order processing tasks. Ad Hoc bases this contention on a study conducted by the Public Staff Division of the California Public Utilities Commission, and requests that the Commission officially notice that stucy and investigate Pacific's proposed NRCs.[660]

595. COMPASS argues that the special access NRC increases proposed by GTOC (Florida) are unjustified, particularly in comparison to rates filed in Florida by BellSouth.[661] COMPASS concludes that if GTOC's costs have increased enough to justify the proposed rate increases, the Commission should investigate to determine whether GTOC has artificially inflated its costs.[662]

b. Replies

596. Ameritech argues that its NRCs are not based on a faulty cost study and that it did not redevelop its NRCs for the annual filing. Ameritech notes that the rates in question became effective on December 24, 1988. Ameritech further asserts that the number of participants in its surveys was representativeof the individual groups studied, and that it took the steps advocated by MCI to prevent bias in its results. Ameritech contends that limiting its study to those responses within one standard deviation of the "most likely" value would improperly restrict its data.[663]

597. Bell Atlantic contends that its non-recurring costs for switched access have declined from 1988, and maintains that MCI used an improper method of calculation.[664] Bell Atlantic submits more detailed cost information for special access, calculated via TOC studies, than the summary data it provided in its initial filing.[665] Bell Atlantic further notes that because a wide variety of special access services exist, each with its own NRC, implementation of a first and additional rate structure for special access would be unduly complex. Bell Atlantic states that it prefers to gain experience with the switched access first and additional rate structure before extending it to special access.[666] Furthermore, Bell Atlantic contends, the Commission rejected attempts to require LECs to disaggregate their non-recurring rate structures in its *NRCOrder*.[667]

598. BellSouth, NYNEX, and Pacific contend that their TOC studies were appropriate and reference the *NRC Order*.[668] In response to LOCATE, BellSouth and NYNEX state that their proposed NRCs reflect anticipated reductions in non-recurring costs associated with DS1 service due to the Commission's revised Uniform System of Accounts.[669] SNET submits that its NRC increases are intended to recover costs fully and are thus reasonable and consistent with Commission policy.[670] Southwestern asserts that MCI's allegations regarding its NRC costing methodology represent an improper attempt to expand the scope of this proceeding. Southwestern further argues that it did not rely on a prior year's cost study for special access NRC time estimates but conducted a new study. In addition, Southwestern maintains that it did not increase its rate for 4.8 Kbps MegaLink Data Services by varying amounts in each state, but contends that MCI based its conclusion solely on data from two areas where MegaLink Data Services costs increased.[671]

599. US West argues that the TOC method it used is widely-accepted, and argues that MCI's analysis is flawed.[672] GTOC contends that its proposed increases in special access NRCs were properly calculated and justified, and are necessary due to increases in the amount of time and the cost of labor. GTOC notes that it did not file this information in 1988 because it did not propose any changes, but submits that it did file such information in 1987. As a result, GTOC argues, its NRCs have been held at the same level for the last two years.[673]

c. Discussion

600. The Commission's *NRC Order* defines non-recurring costs as "the one-time expenses incurred, upon the request of a customer, in installing, moving, rearranging or terminating an access service from the initial receipt of a service order to the point at which service is provided or terminated . . . ."[674] That Order permitted carriers that had been assessing inordinately low NRCs to raise their charges so as to recover the full costs of the associated non-recurring activities. The Commission determined that the TOC studies used by the LECs to calculate the increased charges were reliable, and that divergent results produced by the various carriers' studies were due to regional differences. On December 22, 1988, this Bureau adopted an Order denying petitions to suspend or investigate Ameritech's switched and special NRCs.[675]

601. The Bureau has reviewed the carriers' tariff filings, MCI's petition, and the carriers' reply comments. While we are mindful that NRCs set too high could inhibit entry into the marketplace, we conclude that an investigation of the proposed NRC increases is not warranted at this time. Nor do we require that Bell Atlantic develop a first and additional rate structure for its special access NRCs. The Commission refused to require carriers to disaggregate their rate structures in the *NRC Order*, but did state that "[i]f legitimate cost savings result from certain types of installations, such as multiple installations, carriers should file rates which reflect those cost savings."[676] We believe it the more prudent course for Bell Atlantic to gain experience with its first and additional rate structure for switched access NRCs before extending it to special access. MCI's petition is therefore denied to the extent that it addresses the above issues.

10. SWB Account 2341 Large Private Branch Exchange Investment

a. Petitions

602. MCI submits that Southwestern projects an unusually large increase in Large Private Branch Exchange Investment (Account 2341) assigned to regulated operation. MCI requests that Southwestern be required to explain the Account 2341 regulated increase and make any necessary corrections.[677]

b. Replies

603. Southwestern asserts that its overstatement of Account 2341 was due to the misplacement of a figure on Chart COS-7 which was not used in the calculation of its revenue requirements. Southwestern submits that it has since corrected the error.[678]

c. Discussion

604. Because Southwestern has rectified the error in Account 2341 identified by MCI, this issue is moot.

11. SNET Presubscription Change Charge

a. Petitions

605. MCI asserts that SNET has, without proper justification, proposed to increase its presubscription change charge by 18 percent, from $5.23 per line to $6.17 per line. MCI argues that the Commission should direct SNET to document this increase fully.[679]

b. Replies

606. SNET contends that it has adequately justified its presubscription change charge, and notes that it conducted a time and motion study in 1988 to update the costs associated with the charge. SNET maintains that its filing outlines the work effort, work times, and resulting costs associated with changing a customer's primary interexchange carrier. SNET submits that it developed residential and business costs individually and then calculated a weighted average cost based on exchange lines. In addition, SNET asserts, it used similar methods to develop change charges for Feature Group A and Centrex lines.[680]

c. Discussion

607. Because SNET has sufficiently supported its revised presubscription change charge, MCI's petition is denied regarding this issue.

12. Ameritech Access Line Counts

a. Petitions

608. ALC alleges that Ameritech uses at least three different total access line counts in its calculations. ALC argues that some line counts in its special study section, the line counts used to allocate the support payments among its operating companies, and end user common line demand are inconsistent. ALC argues that the Commission should direct Ameritech to correct these discrepancies, and argues that Ameritech should use the same line counts it used to calculate either baseline rates or demand.[681]

b. Replies

609. Ameritech contends that its use of three different types of line counts is appropriate because the line counts are used for different purposes. Ameritech notes that some line counts are used for allocations, while others are end user chargeable lines used for the development of multi-line business end user charges. Others, Ameritech asserts, represent the access lines used for the NECA support allocation to each company. Ameritech submits that the different calculations for which each type of line is used necessarily yield divergent results.[682]

c. Discussion

610. Ameritech appears to have explained the claimed discrepancies adequately, and we do not believe there is any indication that the line count variations have any distorting effect on Ameritech's rate development. We therefore conclude that further action is unnecessary.

13. Transactions and Earnings of BOCs

a. Petitions

611. ALC contends that the Commission should investigate all BOC access charges that do not allocate total company costs based upon the entire BOC holding company and its BOC subsidiaries. ALC cites a continuing disparity between the growth in access charge expenses and investment at a time when technology should be driving unit costs down. ALC asserts that this could be the result of BOC efforts to capture unregulated profits via inflated investment and expense items procured through the BOCs and their non-regulated subsidiaries. For example, ALC contends, US West has consolidated its operations to the holding company level but continues to perform separations cost analysis at the operating company level. As a result, ALC argues, US West is able to treat transactions between subsidiaries of the holding company, including unregulated subsidiaries, as expenses and investment. ALC observes, however, that because the total earnings of the holding company are not before the Commission, there is no limit on what the holding company charges the operating subsidiaries for various items and services. ALC argues that the regional companies should be required to submit a rate of return analysis which includes data for the holding company and its subsidiaries.[683]

b. Replies

612. Ameritech objects to ALC's argument and notes that the amount which may be charged to ratepayers for assets and services provided by a non-regulated affiliate to a regulated carrier is governed by the Commission's Rules. Ameritech observes that the Commission's Docket 86-111 Rules dictate that all Tier 1 companies must obtain Commission approval of the procedures established in their Cost Allocation Manuals (CAMs) for separating regulated and non-regulated costs and must submit to the Commission annual audits to prove they are properly following those procedures. Moreover, Ameritech argues, because the holding companies and non-regulated subsidiaries do not provide common carrier telcommunications products and services, they are not subject to the rate of return requirements of Title II of the Communications Act and therefore should not be required to submit a rate of return analysis.[684]

613. NYNEX likewise argues that no basis exists for an affiliate transaction investigation. NYNEX notes that its companies are free to choose their own suppliers and submits that its companies have established groups responsible for oversight of purchasing. NYNEX further asserts that NYNEX Material Enterprises Company, which provides services and supplies to NYNEX companies, has shown reasonable profits in comparison to similar companies. Furthermore, NYNEX argues, approval of its CAM and the requirement that it submit an annual independent audit prevent any cross-subsidization of the non-regulated sector by the interstate access ratepayer.[685]

614. Southwestern asserts that the Commission does not have jurisdiction to regulate the profits of a carrier's unregulated affiliates and notes that the Commission's Docket 86-111 Rules ensure that transactions between the carrier and its affiliates do not yield excessive costs or investment levels.[686] US West notes that its companies purchase goods and services through its procurement subsidiary, Business Resources, Inc. (BRI), which does not take title to goods or act as a profit center. US West asserts that savings achieved by BRI due to bulk purchas-

ing are directly passed on to the operating companies, and submits that the fees paid to BRI by the companies cover the costs of BRI's operations.[687]

615. US West also argues that its companies' unification of their access tariffs has resulted in the aggregation of their access rates at a regional level, and is a practice consistent with the Commission's Docket 84-800 Orders.[688] US West notes that these Orders permitted carriers to elect the level of geographic aggregation which is consistent with their ability to forecast. US West further notes that the jurisdictional separations process is performed at the study area level, and questions how ALC reached the conclusion that a linkage exists between the geographic level of access rate aggregation and the level at which jurisdictional separations are performed.[689]

c. Discussion

616. The Docket 86-111 Rules ensure that transactions between carriers and their affiliates are properly conducted. ALC effectively seeks a rule change, which is beyond the scope of this proceeding. The Bureau has reviewed ALC's petition and the carriers' reply comments and we conclude that the carriers apparently have followed the Commission's Rules. Because ALC has presented no compelling argument that an investigation of the carriers' affiliate transactions is warranted at this time, its petition is denied to the extent it requests such an investigation.

VI. DEMAND RESPONSE

A. *Introduction*

617. It is an economic truism that price and demand are inversely related -- a reduction in price can be expected to stimulate an increase in demand by a factor referred to as the "own-price elasticity of demand." In the case of CCL and TS demand, the stimulation of long distance usage and thus of access minutes of use is, however, only indirectly related to any individual carrier's price change. Long distance customers can be expected to respond to the overall, nationally averaged rates charged by AT&T and other ICs. Thus, the calculation of demand response requires the accurate knowledge and calculation of the actual long distance price changes implemented by ICs and elasticity.[690]

618. To calculate switched access demand response, most of the LECs used data prepared by NECA estimating AT&T and other IC price changes likely to result from the projected industry-wide change in access rates. NECA estimated that AT&T would reduce MTS rates by 2.08 percent, reduce WATS rates by 4.77 percent, and reduce directory assistance rates by 2.23 percent. Each LEC then calculated the overall demand response adjustment to its baseline CCL and TS rates based upon its projected elasticity figures and marginal costs. Most LECs used an elasticity of -0.45 for one year weighted switched service demand.

B. *Petitions*

619. US Sprint points out that NECA has excluded demand response from its ratemaking demand quantities as it awaits finalized data from the depooled LECs. Because NECA's common line charge represents the nationwide average rate which would have been implemented had mandatory pooling continued, US Sprint submits that it must include the demand stimulation calculated by depooled LECs.[691] US Sprint also objects to Nevada's failure to incorporate any demand stimulation, [692] and argues that both Ameritech and NYNEX have used unreasonably low estimates of demand response in the calculation of the CCL charge. US Sprint provides a revised method for calculating demand stimulation and argues that Ameritech and NYNEX should be required to explain their low estimates.[693]

C. *Replies*

620. Ameritech objects to US Sprint's assertion that its demand response calculation fails to account for the anticipated April 1989 price change. Ameritech asserts that US Sprint incorrectly uses the long-run price elasticity to calculate short-run demand stimulation, which leads to overstatement of short-run stimulation. Moreover, Ameritech contends, US Sprint fails to account for the lagged response to the estimated 1.35 percent price reduction captured by its lag model. Ameritech also asserts that its predicted demand response is lower than that of several other BOCs due to its particular method of calculation and to geographical and economic characteristics germane to its study area.[694]

621. NYNEX also argues that US Sprint has overestimated demand response associated with CCL.[695] It objects to US Sprint's claim that New York Telephone has underestimated CCL demand due to an excessive bypass adjustment. NYNEX argues that because competition has increased for alternatives to switched access, there is no reason to believe that bypass will decline. NYNEX further contends that the $.01 originating CCL rate will not reduce bypass since bypass is most likely to occur at the originating end of the call. Moreover, although NYNEX concedes that new IC services will affect bypass, it argues that such services will not eliminate bypass because they are primarily substitute services for low volume WATS customers while suppliers of bypass alternatives target high volume customers.[696]

622. Nevada argues that the April 1 CCLC decrease will not in itself affect switched access demand stimulation since such stimulation will be based on IC rates. Nevada notes that any decrease in IC rates will reflect the minimal nationwide average CCL decrease and not the relatively large Nevada rate decrease, and will thus not be sufficient to stimulate demand. Moreover, Nevada asserts, its demand forecast already contains an allowance for price changes that NECA predicts will occur on April 1. Nevada submits that if the actual CCL changes prove substantial, it will review its test year demand forecast and make adjustments to reflect demand stimulation.[697]

D. *Discussion*

623. In general, the methodology used by NECA and most LECs to compute demand stimulation appears reasonable and consistent with methods used to compute demand response in prior years. However, the predicted levels of demand response are based upon estimates of rate reductions by AT&T and the ICs, estimates which in turn were based upon NECA's calculation of total access rate changes as proposed by the LECs and the assumption that AT&T would flow through these changes by reducing the rates for its services in relation to each service's change in access costs.

624. NECA obviously could not forecast the actual IC rate changes precisely, especially in light of the fact that our review of the access tariffs indicates that substantially larger access rate reductions are necessary. In addition, the Commission recently adopted a new method of regulating AT&T which will generate lower long distance rates than would have occurred if rate of return regulation continued to apply.[698] AT&T is required to implement this price cap plan effective July 1, 1989, only three months after the LEC access rates take effect. Because the price cap methodology itself is expected to produce an additional 0.5 percent reduction in nationwide averaged long distance rates, we believe that use of a 2.5 percent across the board rate reduction represents a conservative estimate in the demand response calculations for all LECs. We also believe that the -0.47 figure for elasticity used in prior years is the best available figure.

625. Several LECs used somewhat different approaches and these also appear inaccurate, as US Sprint contends in its petition. While Nevada is correct that its own rate change will not directly stimulate demand, its primary argument is that it did not adjust its rates for demand response because the effect would be small.[699] This approach is unacceptable; rates which are excessive by a small amount are nonetheless excessive. Nevada's alternative claim that its demand forecast already contains an allowance for April 1 price changes is inconsistent both with this representation and with the methodology set out in its support material.

626. NYNEX used NECA's figures for projected IC rate reductions in its calculation of demand response, and an elasticity of -0.29, which it states is derived from its own econometric model.[700] This elasticity is substantially below the elasticities used in prior Commission or Bureau Orders or by other LECs. Ameritech used its own model both to predict IC rate changes and to estimate elasticity. It assumed a nominal -1.35 percent IC price change and -0.37 elasticity. Ameritech defends its elasticity figure on grounds that it reflects the nine-month test period used for this filing.

627. It is unclear in NYNEX's case whether its low elasticity figure represents a methodological error or an approach similar to Ameritech's, but it does seem clear that the figure is too low. In the case of Ameritech, the use of a nine-month elasticity figure does not appear incorrect, but it is inconsistent with the approach used by other carriers and would require separate adjustment in the future to prevent unreasonable rates. In addition, the rate level changes assumed by both Ameritech and NYNEX are incorrect for the same reasons as those of other LECs.

628. Contel contends that it has "implicitly" accounted for demand response in its baseline demand quantification process[701] because its econometric model is based on data over the last few years which encompass substantial rate reductions. Addition of demand response would, it is argued, double count the effect of the smaller rate changes likely this year. An examination of Contel's model, however, indicates that prior price levels were reflected in essentially the same manner as for other LEC models. Thus, the projected IC rate changes should also be reflected by Contel in the same manner as other LECs.

629. Based upon our examination of the LEC filings and our own calculations of the likely upcoming IC rate changes, we have concluded that it is possible to adjust the LEC demand response estimates in a manner which should reasonably remedy both the mistaken assumptions used by all LECs and the errors in methodology committed by a few. To do this, we have extracted the baseline figures projected by the LECs for CCL and TS demand, before any calculations of demand response. Because more recent figures and our general anaylsis of baseline demand demonstrate that these baseline demand figures are understated, we calculated an overall industry-wide adjustment to correct this baseline.

630. We then applied the NECA methodology for estimating demand response based upon an estimated 2.5 percent reduction in AT&T's MTS rates This analysis generates a set of adjustments to CL demand which should reasonably correct LEC demand response projections. These corrections are displayed in Appendix F.

VII. SUMMARY OF ACTIONS TAKEN ON RATES

631. As our discussion of these filings indicates, our review of the record discloses numerous instances in which the LECs used improbable assumptions and predictions, or made other errors in developing their rates. If uncorrected, these mistakes would produce excessive access rates, despite the fact that the filings overall reduce access rates. These excessive rates would ultimately be paid by telephone subscribers in the form of unnecessarily high long distance or private line rates.

632. The Communications Act establishes separate, alternative remedial mechanisms to address these circumstances in Sections 204(a) and 204(b), 47 U.S.C. §§ 204(a), 204(b). In this case Section 204(b) provides the most appropriate remedy. Under Section 204(b) the Commission may allow part of a charge to go into effect based upon a written showing by the carrier and an opportunity for written comment thereon that such partial authorization is just, fair, and reasonable.

633. Our use of Section 204(b) to allow access rates to become effective in part, is the same procedure we have used in previous annual access tariff filings.[702] The tariff filing and petition cycle has provided carriers and the public with an opportunity for written comment that satisfies Section 204(b) procedural requirements. Substantively, we believe it is preferable to calculate adjustments appropriate to correct apparent errors in the LECs' rates wherever these are identifiable and allow the remainder of the rate to become effective. Most of the specific corrections and the partial allowances of proposed rates which we have calculated are summarized and totalled in Appendix G.

634. We have calculated rate adjustment factors (RAFs) to correct the switched traffic sensitive recurring rate elements, including Local Switching, Transport, Equal Access and Information, and all recurring special access rate elements excluding ICB rates and the Special Access Surcharge rate. These RAFs are listed in Appendix G and are to be applied by each designated carrier. For carriers that have filed rates at a holding company level, the RAFs listed for the holding company should be applied. For carriers that have filed rates at an operating company level, the RAFs listed for the operating company should be applied. For carriers that filed rates at neither an holding company or operating company level, carriers are encouraged, but not required, to use the RAFs specified at holding company or operating company level. Alternatively, these companies may recalculate RAFs to be applied to the filed rates so long as such recalculated

RAFs result in cost disallowances equal to the disallowances calculated on a holding company or operating company level, as summarized in Appendix G. Recalculations must be accompanied with a clear explanation of how the alternate RAFs are calculated. All RAFs must be applied uniformly to the rate elements described above, except as noted in the next paragraph.

635. In addition to RAFs, which apply on an access category level, certain switched traffic sensitive access elements and special access rate elements must be further adjusted. For special access, these adjustments involve adjusted demand amounts for certain rate elements, as specified in the text of the Order, in addition to application of the overall special access category RAFs for these rate elements. For switched traffic sensitive access, these adjustments involve rate recalculations for certain elements to implement cost disallowances (as specified in the text of the Order and in Appendix G) in addition to the application of the overall switched traffic sensitive category RAFs for these elements.

636. Pursuant to Section 204(b) of the Act, we will allow the rates in the listed tariffs to take effect in part, subject to these reductions.

637. In the case of the CCL rates, it is necessary for NECA to reflect specific adjustments to the revenue requirement and demand to compute the industry average CCL, which is the rate used by NECA CCL pool members. NECA's CCL rate is allowed to the extent that it properly reflects these adjustments. Other LECs which filed individual CCL rates to be effective April 1 for the first time base their rates in part on information provided to them by NECA and in part on their own costs. Those CCL rates are allowed to the extent that they reflect appropriate calculations of their obligations for Long Term and Transitional Support as recalculated by NECA in accordance with this Order, as well as the specific CCL adjustments for that carrier. The specific CCL adjustments are summarized in Appendix G.

638. We wish to emphasize that neither these partial rate allowances nor the RAFs used to implement them are rate prescriptions pursuant to Section 205(a) of the Communications Act, 47 U.S.C. § 205(a). They represent, rather, partial authorizations of rates to the extent necessary to correct apparently erroneous aspects of the rate development process as set out in the LEC tariff filings and subsequent material of record. The LECs are free to file revisions to the resultant rates at any time. Of course, such filings must be accompanied by relevant cost support information and we would expect the a LEC that files rate increases to address fully the considerations which led us to conclude that the rates filed in these transmittals should be subject to Section 204(b) partial authorization.

639. In a number of cases, LECs have identified errors in their rate development which require reductions in their rates. We have discussed a number of these cases in this Order. While such revisions are subject to grants of special permission, we anticipate that such permissions will be freely granted unless the LEC's request presents additional problems. Each LEC is directed to consolidate all required and allowed changes scheduled to become effective on April 1, 1989, into a single filing.

640. Finally, in the Bureau's Order, Annual 1989 Access Tariff Filings, 4 FCC Rcd 413, 420 (1988) we recognized that the Commission had proposed revisions in the Rules governing calculation and application of the Universal Service Fund and Lifeline Assistance, 47 C.F.R. §§69.116 and 69.117 (1987). *See* Amendment of Part 69 of the Commission's Rules Relating to the Assessment of Charges for the Universal Service Fund and Lifeline Assistance, NPRM, CC Docket Nos. 78-72, 80-286, FCC 88-364, released November 9, 1988. We accordingly granted NECA a waiver to apply the proposed Rules in the present filing. We will extend that waiver pending conclusion of that proceeding.

VIII. ORDERING CLAUSES

641. Accordingly, IT IS ORDERED, pursuant to Section 204(b) of the Communications Act, 47 U.S.C. § 204(b), that the rates for any carrier listed in Appendix G ARE ALLOWED IN PART, as reduced by the Rate Adjustment Factors listed in that Appendix. Those carriers are ordered to issue supplements in compliance with this Order, reflecting reductions and employing the Rate Adjustment Factors, no later than March 30, 1989, with a scheduled effective date of April 1, 1989. Subsequent to such scheduled effective date, carriers may file revised rates directly reflecting these partial authorizations and replacing rates based on Rate Adjustment Factors, to be effective on statutory notice.

642. IT IS FURTHER ORDERED that the National Exchange Carrier Association shall compute a nationally averaged CCL rate consistent with the disallowances and adjustments in this Order, and shall recompute and transmit to each local exchange carrier filing a CCL rate its appropriate Long Term and Transitional Support amounts. Each individual LEC CCL rate is allowed in part, to the extent that it accurately reflects the Long Term and Transitional Support amounts computed by NECA and each disallowance and adjustment required by this Order.

643. IT IS FURTHER ORDERED that the local exchange carriers specified in Section V.B, *supra*, and in Appendix B SHALL REVISE rates reflecting the reductions indicated.

644. IT IS FURTHER ORDERED that the local exchange carriers specified in Section V.C.1, *supra*, and in Appendix C, SHALL REVISE rates reflecting the reductions indicated.

645. IT IS FURTHER ORDERED that the local exchange carriers specified in Section V.C.2, *supra*, and in Appendix D, SHALL REVISE rates reflecting the reductions in Depreciation Expense indicated.

646. IT IS FURTHER ORDERED that the local exchange carriers specified in Section V.C.3, *supra*, and in Appendix C, SHALL REVISE rates reflecting the reductions for Account 6728, Other General and Administrative Costs, as indicated.

647. IT IS FURTHER ORDERED that the local exchange carriers specified in Section V.C.4, *supra*, and in Appendix C, SHALL REVISE rates reflecting the reductions for Category 4 costs as indicated.

648. IT IS FURTHER ORDERED that the New England Telephone and Telegraph Company, as specified in Section V.C.5, *supra*, and in Appendix E, SHALL REVISE rates reflecting the reductions for Excess Deferred Taxes as indicated.

649. IT IS FURTHER ORDERED that the local exchange carriers specified in Section V.C.6, *supra*, and in Appendix C, SHALL REVISE rates reflecting the reductions for Categories 2 and 3 Central Office Equipment as indicated.

650. IT IS FURTHER ORDERED that the local exchange carriers specified in Section V.C.7, *supra*, and in Appendix C, SHALL REVISE rates reflecting the reductions for Central Office Switching Maintenance Expense as indicated.

651. IT IS FURTHER ORDERED that the local exchange carriers specified in Section V.C.9, *supra*, and in Appendix C, SHALL REVISE rates reflecting the reductions for Corporate Operations Expense as indicated.

652. IT IS FURTHER ORDERED that the local exchange carriers specified in Section V.C.10, *supra*, and in Appendix C, SHALL REVISE rates reflecting the reductions for Network Operations Expenses as indicated.

653. IT IS FURTHER ORDERED that the local exchange carriers specified in Section V.C.11, *supra*, and in Appendix C, SHALL REVISE rates reflecting the reductions for Local Business Office and Customer Services (Revenue Accounting) Expenses as indicated.

654. IT IS FURTHER ORDERED that the local exchange carriers specified in Section V.C.12, *supra*, and in Appendix C, SHALL REVISE rates reflecting the reductions for General Support Expenses, Central Office Transmission Expense and Cable and Wire Expense as indicated.

655. IT IS FURTHER ORDERED that the local exchange carriers specified in Section V.C.14, *supra*, and in Appendix C, SHALL REVISE rates reflecting the reductions for Marketing Expense as indicated.

656. IT IS FURTHER ORDERED that the local exchange carriers specified in Section V.C.16, *supra*, and in Appendix C, SHALL REVISE rates reflecting the reductions for Category 2 Cable and Wire Facilities investment as indicated.

657. IT IS FURTHER ORDERED that Pacific Bell, as specified in Section V.D.1, *supra*, and in Appendix E, SHALL REVISE rates reflecting the reductions for Access Tandem Central Office Switching as indicated.

658. IT IS FURTHER ORDERED that the Bell Atlantic Companies (Pennsylvania), as specified in Section V.D.3, *supra*, and in Appendix E, SHALL REVISE rates reflecting the reduction for Local Transport revenue requirement related to COE Category 2 Tandem Switching, as indicated.

659. IT IS FURTHER ORDERED that the US West Companies, as specified in Section V.D.4, *supra*, and in Appendix E, SHALL REVISE rates reflecting the reduction for Account 6362 as indicated.

660. IT IS FURTHER ORDERED that the Bell Atlantic Telephone Companies (New Jersey), as specified in Section V.D.6, *supra*, and in Appendix E, SHALL REVISE rates reflecting the reduction for Other State and Local Taxes as indicated.

661. IT IS FURTHER ORDERED that the Bell Atlantic Telephone Companies, as specified in Section V.D.10, *supra*, SHALL REVISE rates reflecting the reduction in Jointly Used COE Category 4.12 Exchange Trunk Circuit Equipment investment.

662. IT IS FURTHER ORDERED that the local exchange carriers specified in Section V.D.11, *supra*, and in Appendix E, SHALL REVISE rates reflecting the reductions for Local Business Office Expenses as indicated.

663. IT IS FURTHER ORDERED that the local exchange carriers specified in Section V.D.12, *supra*, and in Appendix E, SHALL REVISE rates reflecting the reductions for Category 2 Customer Service Expense as indicated.

664. IT IS FURTHER ORDERED that the Ameritech Operating Companies, as specified in Section V.D.13, *supra*, and in Appendix E, SHALL REVISE rates reflecting a modified Composite Allocator and reduced Local Switching Revenue Requirement for Illinois Bell as indicated.

665. IT IS FURTHER ORDERED that the local exchange carriers specified in Section V.E.2, *supra*, and in Appendix E, SHALL REVISE rates reflecting the reductions for the reassignment of Marketing Expenses and Customer Operations Services Expenses to the interexchange category as indicated.

666. IT IS FURTHER ORDERED that the local exchange carriers specified in Section V.H.1, *supra*, SHALL REVISE rates reflecting modified special access demand forecasts as indicated.

667. IT IS FURTHER ORDERED that Southwestern Bell Telephone Company and the US West Companies (Mountain), as specified in Section V.H.2, *supra*, SHALL REVISE rates reflecting the modifications indicated.

668. IT IS FURTHER ORDERED that the proposed DS3 tariffs of local exchange carriers specified in Section V.H.3, *supra, ARE INCLUDED in the investigation in CC Docket No. 88-136.*

669. IT IS supra, and in Appendix E, SHALL REVISE rates reflecting the reductions in their uncollectible amounts as indicated.

670. IT IS FURTHER ORDERED that the local exchange carriers specified in Section V.I.4, *supra*, SHALL REVISE rates reflecting the reductions in Federal Income Tax Expenses.

671. IT IS FURTHER ORDERED that the local exchange carriers specified in Section V.I.6, *supra*, and in Appendix E, SHALL REVISE rates reflecting the reductions in Equal Access Current Period Expenditures as indicated.

672. IT IS FURTHER ORDERED that the local exchange carriers specified in Section VI, *supra*, and in Appendix F, SHALL REVISE their rates to reflect modified baseline demand adjustments and demand stimulation adjustments as indicated.

673. IT IS FUTHERED ORDERED that the pending special permission applications for errata filed by various local exchange carriers ARE GRANTED to the extent reductions result as indicated herein and are otherwise DENIED for proposed increases.

674. IT IS FURTHER ORDERED that the local exchange carriers SHALL ISSUE supplement(s) reflecting the above specified reductions through the application of the appropriate Rate Adjustment Factors in addition to other reductions as specified.

675. IT IS FURTHER ORDERED that Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, ARE WAIVED for the purpose of compliance with this Order and Special Permission No. 89-226 IS ASSIGNED.

676. IT IS FURTHER ORDERED that the motion to supplement reply filed by the Bell Atlantic Telephone Companies IS DENIED.

677. IT IS FURTHER ORDERED that the letters filed by the NYNEX Telephone Companies, the Lincoln Telephone and Telegraph Company, the Ameritech Operating Companies, and Southwestern Bell Telephone Company in response to the comments on local exchange carrier errata filings ARE DISMISSED.

678. IT IS FURTHER ORDERED that the motion to accept late reply comments filed by the National Exchange Carrier Association, Inc., IS GRANTED.

679. IT IS FURTHER ORDERED that the waiver previously granted to the National Exchange Carrier Association in the Bureau's Order, Annual 1989 Access Tariff Filings, 4 FCC Rcd 413, 420 (1988) concerning the calculation and application of the Universal Service Fund and Lifeline Assistance, 47 C.F.R. §§ 69.116 and 69.117, is hereby extended pending the conclusion of the Commission's proceeding in the Assessment of Charges for the Universal Service Fund and Lifeline Assistance, NPRM, CC Docket Nos. 78-72, 80-286, FCC 88-364, released November 9, 1988.

680. IT IS FURTHER ORDERED that the petitions to suspend and investigate or to reject the annual 1989 access tariff filings ARE GRANTED to the extent indicated herein, BUT ARE OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] 47 C.F.R. § 69.1(b).

[2] 47 C.F.R. § 61.38.

[3] *See* Commission Requirements for Cost Support Material To Be Filed With 1989 Annual Access Tariffs, DA 88-1554, released Oct. 3, 1988 (*TRP Order*).

[4] *See* Access Tariff Filing Schedules, CC Docket No. 88-326, FCC 88-283, released Sept. 14, 1988.

[5] *See* 47 C.F.R. § 67.124(d)(5).

[6] MTS and WATS Structure, CC Docket Nos. 78-72, 80-286, 2 FCC Rcd 2953 (1987) (*NTS Recovery Order), aff' d on recon.*, 3 FCC Rcd 4543 (1988) (*NTS Reconsideration Order*).

[7] *See* Section 61.39 of the Commission's Rules, 47 C.F.R. § 61.39.

[8] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Memorandum Opinion and Order, FCC 88-321, released Dec. 1, 1988 (*Strategic Pricing Order), recon. pending.*

[9] Amendment of Part 69 of the Commission's Rules and Regulations, Access Charges, To Conform It with Part 36, Jurisdictional Separations Procedures, CC Docket No. 87-113, Order on Reconsideration, 4 FCC Rcd 765 (1988) (*Part 69 Conformance Reconsideration Order).*

[10] Public Notice, DA 88-1996, released Dec. 23, 1988.

[11] NECA originally proposed a 2.13 cent per minute terminating premium CCL rate, and revised that rate to 2.09 cents in a subsequent errata. The NECA rate corresponds to the industry average CCL rate.

[12] There have also been a number of intermediate revisions to access rates since these tariffs were filed. *See, e.g.,* Access Tariff Rate Levels, DA 88-2053 (released December 30, 1988)

[13] Fifteen parties filed petitions against the access tariffs and 17 LECs filed replies. In addition, comments on LEC errata filings were submitted by three parties. For a list of all of these parties, see Appendix A.

[14] *See* Public Notice, Procedures for Filing Errata to Support Information for Annual 1989 Access Tariffs, 4 FCC Rcd 748, 749 (1989).

[15] These carriers are Bell Atlantic, Ameritech, NYNEX, Lincoln, and Southwestern.

[16] AT&T Petition, App. F at 1-4.

[17] US West Reply at 21-22.

[18] *Id.* at 22.

[19] *See* Annual 1988 Access Tariff Filings, 3 FCC Rcd 1281, 1288 (1987) (*1988 Access Tariff Order).*

[20] NYNEX Reply, App. C.11.

[21] *See, e.g.*, US West Reply at 18; NYNEX Reply, App. C.11.

[22] US Sprint Petition at 5.

[23] *See, e.g.*, Ameritech Reply at 34-41.

[24] US Sprint Petition at 5.

[25] US West Reply at 19.

[26] AT&T Petition, App. E at 1-3.

[27] *Id.* at 5-6.

[28] US Sprint Petition at 3, 5-6; AT&T Petition, App. E.

[29] AT&T Petition, App. E at 8; MCI Petition at 100.

[30] AT&T Petition, App. E at 1, 2, 13.

[31] MCI Petition at 42, 43, 47.

[32] US Sprint Petition at 3, 5-7.

[33] NYNEX Reply, App. C.11.

[34] AT&T Petition, App. 3 at 7.

[35] *Id.* at 14-15.

[36] BellSouth Reply at 23-24.

[37] AT&T Petition, App. E at 5, 10.

[38] *Id.*, App. E at 4.

[39] AT&T also notes that Ohio Bell has substantially reduced its assignment of depreciation expense to nonregulated. *Id.*, App. E at 13. Ameritech concedes that the entry is in error but the amount is apparently *de minimis*. Ameritech Reply at 33 n.

[40] Detariffing the Installation and Maintenance of Inside Wiring, Second Report and Order, CC Docket No. 79-105, 51 Fed. Reg. 8,498 (Mar. 12, 1986) (*Detariffing Order), recon.*, 1 FCC Rcd 1190 (1986)(*Inside Wiring Reconsideration Order), further recon.*, 3 FCC Rcd 1719 (1988) (*Inside Wiring Further Reconsideration Order), petition for review pending sub nom. NARUC v. FCC*, Case No. 86-1687 (D.C. Cir. Dec. 11, 1986); Modifications to the Uniform System of Accounts for Class A and B Telephone Companies, 48 Fed. Reg. 50,534 (Nov. 2, 1983) (*USOA Order).*

[41] *Detariffing Order* at para. 55.

[42] *USOA Order* at para. 55.

[43] *Detariffing Order* at n.36.

[44] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, (Report and Order), CC Docket No. 86-111, 2 FCC Rcd 1298 (1987)(*Joint Cost Order), recon.*, 2 FCC Rcd 6283 (1987)(*Reconsideration Order), further recon.*, 3 FCC Rcd 6701 (1988)(*Further Reconsideration Order), petition for review pending*, Southwestern Bell Corp. v. FCC, D.C. Circuit No. 87-1764 (filed Dec. 14, 1987).

[45] *Joint Cost Order*, 2 FCC Rcd at 1317-19.

[46] *Id.* at 1329; *id.* at 1334.

[47] *See, e.g.*, Ameritech Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 433 (1988) (*Ameritech Compliance Order)*. We disapproved the manual initially filed by SNET. Southern New England Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 5625 (1988) (*SNET Order)*.

[48] *See, e.g., Ameritech Compliance Order* ; Nevada Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs and Pacific Bell's Permanent Cost Allocation Manuel for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 7081, 7084 (1989)(*Nevada and Pacific Compliance Order)*.

[49] *E. g., Nevada and Pacific Compliance Order.*

[50] *See, e.g.*, Bell Atlantic Operating Companies Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 4 FCC Rcd 496, 502-07, (1989) *(Bell Atlantic Compliance Order)*.

[51] MCI Petition at 24-25.

[52] US Sprint Petition at 11-12.

[53] Ameritech Reply, App. B at Item 10.

[54] Bell Atlantic Reply, App. A at Item 25.

[55] BellSouth Reply at 21 (quoting Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, Memorandum Opinion and Order, FCC 88-420, released Dec. 27, 1988, at para. 28).

[56] Contel Reply at 21.

[57] Cincinnati Reply at 3.

[58] NYNEX Reply, App. E.2 at 2-3.

[59] Nevada Reply at 4-5.

[60] SNET Reply at 3-4.

[61] GTOC Reply at 30.

[62] Southwestern Reply at 11-12.

[63] *Id.* at 11 n.22.

[64] US West Reply at 25-27.

[65] *Id.* at 32-33.

[66] *Joint Cost Order*, 2 FCC Rcd at 1317.

[67] As used in this Order, trouble isolation refers to functions that the field technician performs at the demarcation point to determine the location of the problem in relation to that point.

[68] Because field technicians do not make maintenance calls to confirm that customers are receiving reliable service, the problem to be isolated is the cause of the customer premises visit.

[69] Michigan Bell and Pacific apply this policy only if it has not previously installed a standard network interface device at the customer premises.

[70] We note that many LECs apparently charge their non-maintenance plan customers for customer premises visits that are caused by inside wiring or CPE problems, even if the customers elect not to purchase the LECs' repair services. Those companies who impose no such charge even though they are willing to repair the inside wiring of their non-maintenance plan customers would appear to have made a pricing decision in marketing nonregulated repair services.

[71] This method is set forth in the cost manual that Pacific used in preparing its regulated wiring expense forecasts for 1989. We note that we have previously rejected this and other aspects of Pacific's apportionment methods for inside wiring. *Nevada and Pacific Compliance Order*, 3 FCC Rcd at 7084.

[72] The *Docket 88-1 Phase II Order* includes no-access visits within the no-trouble-found category.

[73] South Central Bell states, however, that it classifies its no-access costs as nonregulated to the extent they are incurred in connection with trouble isolation activities that take less than 15 minutes and are associated with a work activity on the customer's side of the demarcation point.

[74] Illinois Bell and Ohio Bell assign only a portion of their no-access costs, if any, incurred in testing inside wiring and CPE to nonregulated activities.

[75] Although Wisconsin Bell now assigns a portion of its testing costs for inside wiring and CPE to nonregulated activities, that procedure differs from the procedure in effect when Wisconsin Bell prepared its regulated wiring forecasts for 1989.

[76] General Telephone Company of Florida Procedures at 10.

[77] Southwestern Guidelines and Instructions at § 5.01.

[78] This information was obtained in connection with the investigation in CC Docket No. 88-1. The categories included in this data request consist of visits in which the field technician isolates a regulated problem, isolates a nonregulated problem, isolates both regulated and nonregulated problems, and isolates no problem, and performs only installation work. We asked the companies to provide separate figures for those visits in the first four categories which involved installation activity.

[79] Other asset items, such as Material and Supplies, are also included in the analysis and discussed in this Section.

[80] Data for the analysis are contained in Charts COS-2 of the 1988 and 1989 TRPs. Time-series data prior to 1986 are contained in the 1988 TRP; data from 1986 through the third quarter of 1988 are contained in the 1989 TRP.

[81] A *1988 Access Tariff Order*, 3 FCC Rcd at 1285-86.

[82] The cost categories include 12 plant or asset categories and 10 expense categories.

[83] A COSA consists of the operations of a LEC in a particular state.

[84] Report card data is contained in the TRPs. Report cards also measure the accuracy with which LECs have forecast switched access minutes of use (MOU) in previous annual access tariff filings.

[85] Since actual data for the 1988 test year were not available at the time of the 1989 annual access filing (December 30, 1988), an estimate of 1988 actual data was developed by normalizing the past year cost of service (PYCOS) data. The PYCOS data consisted of data from the first three quarters of 1988 and were normalized by multiplying the data by 4/3.

[86] Annual 1985 Access Tariff Filings, Order Designating Issues for Investigation, CC Docket No. 86-125, Phase I, Mimeo 3643, released Apr. 14, 1986 (*April 1986 Order)*, para 91.

[87] *1988 Access Tariff Order*, 3 FCC Rcd 1285.

[88] We detected anomalous results in report card data. First, we observed that certain companies' data in 1988 indicated underestimations of unseparated ELD by 10 percent or more, a highly unlikely result. Investigation revealed that this was due to certain companies' exclusion of settlement expense from forecasts but inclusion in actuals. We adjusted ELD data in 1988 in

those instances by subtracting settlements from 1988 actuals. Second, we detected other cases of probably erroneous underestimations of 10 percent or more but were unable to identify the cause or make corrections. In order to prevent these likely errors from resulting in a passing three-year report card test, we replaced them with the designation "ERR" and assigned a value of zero percent to the comparison between forecasts and actuals. Forecasts which are overestimated by 10 percent are also probably erroneous. In order to provide LECs an incentive to improve the accuracy of their data, we refrained from replacing such likely errors with "ERR."

[89] A margin of 1 percent is reasonable in order to allow for the cost effects of demand stimulation that were not contained in the carriers' forecasts of baseline costs and, for ELD, seasonality adjustment for 1988 actual data. First, short-term unseparated cost effects of stimulated interstate demand are very small. They are probably well below 1 percent per year, even for years in which substantial interexchange rate reductions occurred. Second, analysis of ELD seasonality results in a finding that, in the aggregate, annualization of PYCOS data by 4/3 understates the likely magnitude of calendar year 1988 actuals by 1 to 1.5 percent. Discrepancy due to seasonality is relevant only for the 1988 report card. Hence, averaging the margin for demand stimulation for each of the three report cards and the margin for ELD seasonality for the 1988 report card results in a finding that a margin of 1 percent is sufficient for both the TPIS and ELD report card tests.

[90] *See* Local Exchange Carrier Access Tariff Rate Levels, Order To Show Cause, CC Docket No. 88-554, DA 88-1869, released Dec. 2, 1988 (*Show Cause Order*). As confirmed in subsequent Orders in that docket, the *Show Cause Order* listed numerous LECs that failed to initiate midcourse corrections even after the likelihood of earnings above the ceiling of the authorized rate of return became evident.

[91] As discussed above, more data also exist for evaluating the accuracy of LECs' previous forecasts. In the *1988 Access Tariff Order*, we drew a relationship between the amount of report card data at our disposal and the stringency of our statistical analysis of LECs' forecasts of test year data. In reference to the trend analysis that we conducted for ELD, we stated that:

> [w]e regard the criteria for both testing the reasonableness of the companies' forecasts and for determining the adjustment amount for the forecasts that are found to be unreasonable to be conservative. Determining a reasonable confidence interval is a difficult judgment. Adjustment to the upper bound of a 95 percent confidence interval allows the company great margin for error. One reason we have decided to allow companies such a large margin is because their "track record" consists only of performance for one test year. As the track record of companies becomes clearer in future years, we may revise the size of the confidence interval.

3 FCC Rcd at 1286.

[92] The forecast mean is developed from a linear trend analysis of quarterly TPIS data from third quarter 1984 through fourth quarter 1988. The forecast consists of the sum of second through fourth quarter 1989 TPIS amounts, annualized by multiplying by 4/3.

[93] The discontinuity is a sudden jump in ELD costs to a higher plateau in the first quarter of 1988, for most companies and for the aggregate of companies. The ELD costs appear to stabilize and resume gradual growth at this higher level for the remaining quarters in the time series.

[94] The forecast mean is developed from a linear trend analysis of quarterly ELD data from third quarter 1984 through fourth quarter 1988. Seasonal variables prove statistically significant and are applied on a quarterly basis. Similarly a "dummy variable" for the implementation of Part 32 is included for the first quarter of 1988 and subsequent quarters. The forecast consists of the sum of second through fourth quarter 1989 TPIS amounts, annualized by mulitplying by 4/3. It has come to our attention that some companies have included settlement amounts in their actual ELD data. We have removed these amounts because they may not be relevant to the evaluation of interstate rates and inclusion in the analysis may significantly distort the results.

[95] The Chart COS-8 database is a LOTUS spreadsheet version of Chart COS-8. The Bureau directed the LECs to verify that the database accurately reflected PYCOS and test year costs, correct erroneous data and supply omitted data. *See* Letters from the Chief, Tariff Division, Common Carrier Bureau to the Tier 1 Local Exchange Companies, Feb. 8, 1989.

[96] *See 1989 TRP.*

[97] Categories 106 through 114, Depreciation and Amortization Expenses, are analyzed in Section V.C.2, *infra*. Categories 191 through 227 contain revenue data, and were not used in the cross section analysis of costs.

[98] NET's Vermont study area represents an extreme case, with no usable ELD data. As explained above, LECs were responsible to ensure the accuracy of their own data. The Bureau required that the final version of the data be provided no later than February 13, 1989. Although some carriers have filed requests for special permission to correct data, these requests were not timely for the cross sectional analysis.

[99] The effect of State and Local Income Tax was also computed for disallowances derived from cross section analysis.

[100] Ad Hoc Petition at 41-43.

[101] AT&T Petition at 2-4.

[102] MCI Petition at 102-03.

[103] *Id.* at 49-53.

[104] Southwestern Reply at 9, 14-15.

[105] MCI Petition at 49-53.

[106] Bell Atlantic Reply, App. A at Item 6.

[107] MCI Petition at 41.

[108] US Sprint Petition at 4.

[109] *Id.* at 4-5.

[110] MCI Petition at 36-40.

[111] AT&T Petition, App. B at 3.

[112] BellSouth Reply at 12-13.

[113] Rochester Reply at 7-8.

[114] Bell Atlantic Reply, App. A at Item 6.

[115] Ameritech Reply at 17-18.

[116] BellSouth Reply at 5-11.

[117] GTOC Reply at 10-11.

[118] Nevada Reply at 10-11.

[119] Pacific Reply at 25-26.

[120] NYNEX Reply, App. D.5.

[121] *Id.*, App. C.1.c.

[122] BellSouth Reply, App. I at 12-13.

[123] *Id.*

[124] Cincinnati Reply at 5-12.

[125] NYNEX Reply, App. C.5.a.

[126] Bell Atlantic Reply, App. A at Item 9.

[127] Ameritech Reply at 23-24.

[128] *Id.*

[129] Rochester Reply at 5-8.

[130] Southwestern Filing, Volume 2-1, Section 5.

[131] BellSouth Reply at 11-14.

[132] Ameritech Reply at 24-26.

[133] *Id.* at 22-23.

[134] Bell Atlantic Reply, App. A at Item 9.

[135] United Reply at 2-3.

[136] NYNEX Reply, App. C.5.a.

[137] Contel Reply at 5-8.

[138] Bell Atlantic Reply, App. at Item 3, Item 9.

[139] Rochester Reply at 5-8.

[140] Cincinnati Reply at 1-12, 16.

[141] US West Reply at 9-10.

[142] NYNEX Reply, App. C.1.a.

[143] *Id.* App. C.4, App. C.6.

[144] Southwestern Reply at 14-15.

[145] Southwestern Filing, Vol. 2-1 at 5-7.

[146] Pacific Reply at 22-23.

[147] Nevada Reply at 7-8.

[148] Ameritech Reply at 22-23.

[149] *Id.* at 21.

[150] Contel Reply at 5-8.

[151] GTOC Reply at 27.

[152] BellSouth Reply at 20.

[153] BellSouth Filing, Vol. 2 at 7-3.

[154] NYNEX Reply, App. C.5.a.

[155] US West Reply at 6.

[156] *See* 1989 TRP at paras. 18-19.

[157] AT&T Petition at 5.

[158] *Id.*, App. B-2 at 1.

[159] *Id.* at 5-7.

[160] *Id.* at 8-9.

[161] MCI Petition at 104.

[162] MCI Comments on Errata Filings at 12-13.

[163] NYNEX Reply, App. C.2.

[164] Bell Atlantic Reply, App. A at Item 4.

[165] Southwestern Reply at 2 n.3.

[166] *See, e.g.*, Annual 1987 Access Tariff Filings, 2 FCC Rcd 866, 873 (1986).

[167] *Id.*

[168] AT&T and MCI also challenge Southwestern's depreciation expense level because application of the rates to the plant balances did not yield the claimed expense. Southwestern agrees that its computations were faulty, and has eliminated the problem in its errata filing. *See* MCI Comments on Errata Filings at 12-13.

[169] *Id.*

[170] *See generally* Petition for Waiver of Section 31.232(b) of the Commission's Rules, FCC 83-585, released Dec. 21, 1983.

[171] The Prescription of Revised Percentages of Depreciation pursuant to the Communications Act of 1934, as amended, for: Cincinnati Bell Telephone Co. *et al.*, FCC 88-427, released Jan. 25, 1989 (*1988 Depreciation Rates Order*).

[172] *Id.* at paras. 18-19.

[173] MCI Petition at 103.

[174] BellSouth Reply, App. I at 12-13.

[175] Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, Memorandum Opinion and Order, FCC 88-420, released Dec. 27, 1988 (*Docket 88 - 1 Phase II Order), recon. pending.*

[176] MCI Petition at 62-64.

[177] *Id.* at 64-65.

[178] Ad Hoc Petition at 41-43.

[179] BellSouth Reply at 26-27.

[180] US West Reply at 5, 6.

[181] Bell Atlantic Reply, App. A at Item 16.

[182] NYNEX Reply, App. C.1.b.

[183] GTOC Reply at 6-7.

[184] Cincinnati Reply at 16.

[185] MCI Petition at 55-57.

[186] *Id.* at 57.

[187] *Id.* at 57-58.

[188] Ameritech Reply at 54-56, Ex. III-3.

[189] BellSouth Reply at 14-16.

[190] NYNEX Reply, App. I.4.

[191] US West Reply at 34.

[192] GTOC Reply at 16-18.

[193] Centel Reply at 6-8.

[194] United Reply at 3-4.

[195] Rochester Reply at 9-10.

[196] NYNEX Reply, App. I.4.

[197] AT&T Petition at 2 & n.**.

[198] *Id.* at 2-4 & 4 n.**.

[199] MCI Petition at 59-62.

[200] MCI Comments on Errata Filings at 11-12.

[201] Ameritech Reply at 26-29.

[202] Bell Atlantic, App. A at Item 3.

[203] GTOC Reply at 27-28.

[204] NYNEX Reply at Apps. C.1.a, C.1.b & C.1.c.

[205] US West Reply at 3-6.

[206] BellSouth Reply at 19-20.

[207] MCI Petition at 49-52.

[208] Bell Atlantic Reply, App. A at Item 6.

[209] US West Reply at 9-10.

[210] NYNEX Reply, App. C.6.

[211] Cincinnati Reply at 14-15.

[212] Southwestern Reply at 9, 14-15.

[213] Pacific Reply at 22-23.

[214] Rochester Reply at 10-11.

[215] BellSouth Reply, App. I at 18.

[216] MCI Petition at 47-48.

[217] Ameritech Reply, App. B at 3.

[218] Bell Atlantic Reply, App. A at Item 8.

[219] US West Reply at 72-73.

[220] NYNEX Reply, App. C.5.b, at 2.

[221] Cincinnati Reply at 13.

[222] BellSouth Reply at 14.

[223] Pacific Reply at 28.

[224] MCI Petition at 41-47.

[225] *Id.* at 42-46.

[226] *Id.* at 43-47.

[227] *Id.* at 44-47.

[228] *Id.* at 43-46.
[229] US Sprint Petition at 3, 5.
[230] MCI Comments on Errata Filings at 10-11.
[231] Rochester Reply at 5-8.
[232] Cincinnati Reply at 7-12.
[233] NYNEX Reply, App. C.5.a.
[234] SNET Reply at 5.
[235] BellSouth Reply at 11-14.
[236] Ameritech Reply at 24-26.
[237] Southwestern Reply at 5-8, 20-21.
[238] Pacific Reply at 28-29.
[239] Bell Atlantic Reply, App. A at Item 9.
[240] US Sprint Petition at 4.
[241] Bell Atlantic Reply, App. A at Item 9.
[242] Ameritech Reply at 23-24.
[243] NYNEX Reply, App. C.4.
[244] US Sprint Petition at 4.
[245] Ameritech Reply at 21.
[246] BellSouth Reply, App. I at 16-17
[247] Bell Atlantic Reply, App. A at Item 9.
[248] US Sprint Petition at 5.
[249] Ameritech Reply at 21-23.
[250] Bell Atlantic Reply, App. A at Item 9.
[251] BellSouth Reply at 17-18.
[252] ALC Petition at 22-24.
[253] Ameritech Reply at 10-12.
[254] BellSouth Reply, App. I at 2-4.
[255] Bell Atlantic Reply, App. A at Item 10.
[256] NYNEX Reply at App. C.8.
[257] Southwestern Reply at 3-4.
[258] AT&T Petition at 10-14, App. B-3.
[259] MCI Petition at 35-38.
[260] *Id.* at 38-40.
[261] US Sprint Petition at 3.
[262] MCI Comments on Errata Filings at 7-10.
[263] Rochester Reply at 8-9.
[264] Bell Atlantic Reply, App. A at Item 5.
[265] BellSouth Reply at 5-8.
[266] *Id.* at 8-11.
[267] Contel Reply at 5-8.
[268] GTOC Reply at 10-11, 28-29.
[269] NYNEX Reply, App. C.3.
[270] *Id.*
[271] United Reply at 2-3.
[272] Ameritech Reply at 17-21.
[273] Pacific Reply at 25-26.
[274] Southwestern Reply at 4-5.
[275] MCI Petition at 4-6.
[276] *Id.* at 6-7.
[277] *Id.* at 7-9.
[278] Ameritech Reply at 71.
[279] NYNEX Reply, App. B.1.
[280] BellSouth Reply at 44-45.
[281] Bell Atlantic Reply, App. A at Item 27.
[282] Pacific Reply at 18.
[283] US West Reply at 63.
[284] MCI Petition at 102-03.
[285] Bell Atlantic Reply, App. A at Item 7.
[286] ALC Petition at 20.
[287] AT&T Petition, App. D-10 at 8-9.
[288] Bell Atlantic Reply, App. A at Item 13.
[289] US West Reply at 31-32; NYNEX Reply, App. H.2.
[290] NYNEX Reply, App. H.2. NET asserts that of that amount, $1,060,000 was expected to be incurred in 1988 and the remaining $1,219,000 was expected to be incurred during the first quarter of 1989. *Id.*
[291] *Id.* (citing MTS and WATS Market Structure, CC Docket Nos. 78-72 and 80-286, Joint Board Recommended Decision, Mimeo No. 0138, released Oct. 8, 1985, at 20 n.37).
[292] BellSouth Reply at 27-28.
[293] Nevada Reply at 22; Southwestern Reply at 22-23; Cincinnati Reply at 17. *See also* Ameritech Reply, App. B at Item 4.
[294] Pacific Reply at 9.
[295] *See* App. E, *infra*.
[296] AT&T Petition, App. C-12 at 1-3 (citing MTS and WATS Market Structure, CC Docket Nos. 78-72, 80-286, and 86-297, Order on Reconsideration and Supplemental Notice of Proposed Rule Making, 3 FCC RCd 5518, 5523 (paras. 27-29)(1988)).
[297] Bell Atlantic Special Permission No. 84, Tab 9.
[298] *Id.*
[299] AT&T Petition, Apps. C-9 & C-10. AT&T asserts that these overstated revenue requirements correspond to interstate investment that is overstated by $2,342,000 and $1,800,000, respectively. *Id.*
[300] *Id.*, App. C-9.
[301] *Id.*, App. C-10.
[302] Bell Atlantic Reply, App. A at Item 20.
[303] NYNEX Reply, App. D.3.
[304] AT&T Comments on Errata Filings, Supp. App. C-9.
[305] *See* 47 C.F.R. § 69.306(c).
[306] *See* App. E, *infra*.
[307] AT&T Petition, App. C-7 at 1-3.
[308] US West Reply at 27-29. *See also id.*, Exhibit 5 (purporting to show that, after correcting the COS-7(P) charts for distortions related to inside wire, AT&T's calculations would not suggest any overallocation of expense).
[309] *See* 47 C.F.R. § 36.331.
[310] *See* 47 C.F.R. §§ 36.142, 36.331.
[311] AT&T Petition, App. C-7 at 3.
[312] *See* App. E, *infra*.
[313] AT&T Petition, App. C-5 at 1-2.
[314] MCI Petition at 101.
[315] GTOC Reply at 12. GTOC contends that the report was prepared in CC Docket No. 87-339 based upon data developed in CC Docket No. 80-286. *Id.*
[316] Id.
[317] Id., Exhibit 4 (citing October 1987 GTOC Section 61.38 Vol. 5 of 7).
[318] AT&T Petition, App. B-4.
[319] Bell Atlantic Reply, App. A at Item 18.
[320] AT&T Petition at 15-19, App. C-1.
[321] Ad Hoc Petition at 30-37.
[322] Bell Atlantic Reply, App. A at Item 24.
[323] GTOC Reply at 3-5.
[324] NYNEX Reply at 16-17.

[325] *Id.*, App. D.1.

[326] *Id.*, App. D.2.

[327] Pacific Reply at 2-8.

[328] Ad Hoc Petition at 37-40.

[329] NYNEX Reply, App. D.4.

[330] Ad Hoc Petition at 25-30.

[331] Ameritech Reply at 47-52.

[332] AT&T Petition at 20-21, App. C-2.

[333] Bell Atlantic Reply, App. A at Item 19.

[334] AT&T Comments on Errata Filings, Supp. App. C-2.

[335] AT&T Petition at 22-25, App. C-3.

[336] Bell Atlantic Reply, App. A at Item 26.

[337] Pacific Reply at 11-12.

[338] The national average expenditure for telephone service in 1982-1983 was $395, while the average expenditure in San Diego was $437; in Los Angeles, $447; and in San Francisco, $506. *See*, J. Lande & P. Wynns, *Primer and Sourcebook on Telephone Price Indexes and Rate Levels*, Apr. 1987.

[339] In August 1988, in response to requests for reconsideration of several separations issues, including Revenue Accounting Expense, the Commission issued a *Reconsideration Order*, that among other things, referred this issue to the Docket 80-286 Joint Board, reinstated the Part 67 rules for the Other Billing and Collection subcategory effective April 1, 1989, and requested comments and data that the Joint Board could use in developing recommendations to the Commission regarding the separations treatment of the Other Billing and Collection Expense subcategory. *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 3 FCC Rcd 5518 (1988).

[340] For carriers and amounts, see Appendix E.

[341] Amendments of Part 67 (New Part 36), 2 FCC Rcd 2639, 2649 (1987) (*Part 36 Order*).

[342] Ameritech D&J at 14.

[343] Transmittal No. 206 was partially suspended, Ameritech Operating Companies, CC Docket No. 88-528, DA 88-1750, released Nov. 2, 1988. On January 17, 1989, Ameritech notified that Bureau the it no longer intended to pursue implementation of the portions of proposed Illinois Bell rate increases that had been placed under investigation, and requested that the Bureau's investigation be terminated. That response, and the petition to declare Illinois Bell's partially suspended rates unlawful, filed November 16, 1988, by Ad Hoc, will be addressed in a separate Order.

[344] Ameritech Transmittal No. 252 (Tariff F.C.C. No. 2), Cost Support Vol. 3 at Exh. 3-1.

[345] Ameritech Transmittal No. 252, D&J Vol. 4, Ex. 4-4 at 5.

[346] MCI Comments on Errata Filings at 14-18.

[347] AT&T Comments on Errata Filings, Supp. App. K.

[348] AT&T Petition, App. C-13 at 1.

[349] Ameritech Reply at 58-59.

[350] Bell Atlantic Reply, App. A at Item 22 & Exhibit 22-A.

[351] ALC Petition at 25-26.

[352] Ameritech Reply, App. B at No. 9, 9-2.

[353] NYNEX Reply, App. E-3.

[354] US West Reply at 36.

[355] We used the TRP revenue data Net Revenues from COS 1(H) Line 175 Column T divided by Line 175 Column F. The TRP data we used for marketing expenses and customer operations services expenses were from COS 1(P) Columns G and U lines 200 and 210. New England Telephone failed to provide revenue data on TRP COS 1(H). To calculate its disallowance for marketing expenses we used revenue data from the first three quarters of the ARMIS quarterly report, Line 190 Columns G and N.

[356] AT&T Petition, App. C-11 at 1.

[357] Bell Atlantic Reply, App. A at Item 21.

[358] MCI Petition at 104-05. *See also* MCI Comments on Errata Filings at 14.

[359] NYNEX Reply, App. C.10.

[360] *Id.* Ameritech Reply, App. B, No. 12-2.

[361] *E.g.*, BellSouth Reply at 65; US West Reply at 68-69.

[362] BellSouth Reply at 65; NYNEX Reply, App. C-10; Southwestern Reply at 74; US West Reply at 68-69.

[363] US West Reply at 68-69.

[364] *See generally* ALC Petition at 3-10. *See also* ALC Petition To Reject in Part, filed Feb. 16, 1989.

[365] ALC Petition at 10-11. ALC asserts that NECA has taken advantage of the USF and Lifeline programs to cross-subsidize its competitive operations, but does not elaborate on this contention. *Id.*

[366] *Id.* at 12-15.

[367] NECA Reply at 14.

[368] US West Reply at 57, 60; Cincinnati Bell Reply at 17; BellSouth Reply at 62, 64.

[369] US West Reply at 58; NECA Reply at 15; Cincinnati Bell Reply at 19; Soutwestern Reply at 72.

[370] Ameritech Reply at 3; US West Reply at 59; BellSouth Reply at 62.

[371] Cincinnati Bell Reply at 19; Southwestern Reply at 74.

[372] NECA Reply at 15 (citing ALC Petition at 10-11).

[373] Ameritech Reply at 90-91.

[374] *Id.* at 90 n.120.

[375] *See, e.g.*, MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Recommended Decision and Order, 2 FCC Rcd 2324 (1987); MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Report and Order, 2 FCC Rcd 2953 (1987); Amendment of Part 69 of the Commission's Rules Relating to the Assessment of Charges for the Universal Service Fund and Lifeline Assistance, CC Docket Nos. 78-72 and 80-286, Notice of Proposed Rule Making, FCC 88-364, released Nov. 9, 1988; MTS and WATS Market Structure, Link-Up America, and Amendment of Part 36, Decision and Order, CC Docket No. 88-341, FCC 89-78, released Feb. 27, 1989.

[376] ALC Petition at 11.

[377] In its reply, ostensibly in support of its position, Ameritech cites a section of the rules which applies to Non-Level 1 or 2 Companies. *See* Ameritech Reply at 91. We note that Ameritech's interpretation of this aspect of the rule is misleading and is, without question, an incorrect view of the Commission's support payment rules for a Level 1 Contributor.

[378] MCI Petition at 11-13.

[379] *Id.* at 13 n.12.

[380] *Id.* at 13-14.

[381] For a further discussion of uncollectibles, see Section V.I.3, *infra*.

[382] *Id.* at 20-22.

[383] *Id.* at 22-23.

[384] *Id.* at 25-28.

[385] NECA Reply at 5-7.

[386] *Id.* at 11-12.

[387] *Id.* at 9.

[388] *Id.* at 10.

[389] *Id.* at 10-11, 12.

[390] *Id.* at 7-8.

[391] *Id.* at 12-13.

[392] *See* Petitions for Waiver Concerning Annual Access Tariff Filings, Mimeo No. 5007, released June 7, 1985, at para. 50.

[393] *See Waiver Order* at para. 5.

[394] *See* Annual 1988 Access Tariff Filings, Memorandum Opinion and Order, DA 87-1876, released Dec. 24, 1987, at paras. 235-240.

[395] For a discussion of the BOCs' projected declines in pre-July 1983 Centrex revenues, see Section V.G.2, *infra*.

[396] MCI Petition at 28-29.

[397] *Id.* at 29.

[398] *Id.* at 31-32.

[399] US Sprint Petition at 8-10. For a discussion of uncollectibles, see Section V.I.3, *infra*.

[400] *Id.* at 16-18.

[401] Ameritech Reply at 57-58.

[402] *Id.* at 84.

[403] *Id.* at 85-86.

[404] *Id.* at 86-89.

[405] *Id.* at 89-90.

[406] Bell Atlantic Reply, App. A at Item 35.

[407] *Id.* at Item 37.

[408] *Id.* at Item 33.

[409] *Id.* at Item 34.

[410] BellSouth Reply at 43.

[411] Cincinnati Reply at 4.

[412] *Id.* at 5-6.

[413] NYNEX Reply, App. B.8 at 1-2.

[414] *Id.*, App. B.7 at 1-5.

[415] *Id.*, App. E.2 at 1-3.

[416] *Id.*, App. B.6 at 1.

[417] Nevada Reply at 21.

[418] *Id.* at 24-25.

[419] Pacific Reply at 24.

[420] *Id.* at 19-20.

[421] Southwestern Reply at 13.

[422] *Id.* at 33-34. *See also id.*, Attachment 2 at 1 (shows downward trend of special access surcharge).

[423] US West Reply at 55-57.

[424] GTOC Reply at 18-20.

[425] *See* Section V.G.1.c, *supra*.

[426] MCI Petition at 34-35.

[427] US Sprint Petition at 14-16.

[428] Nevada Reply at 12-15.

[429] *Id.* at 15-16.

[430] Pacific Reply at 35-37.

[431] AT&T Comments on Errata Filings, Supp. App. K at 1-2.

[432] MCI Petition at 14-15.

[433] MCI Comments on Errata Filings at 4 n.5.

[434] *Id.* at 30-31.

[435] *Id.* at 16-20.

[436] *Id.* at 97.

[437] *Id.* at 97-98.

[438] US Sprint Petition at 22-24.

[439] *Id.* at 24-26.

[440] *Id.* at 26-29.

[441] *Id.* at 29-30.

[442] ALC Petition at 19-20.

[443] Ameritech Reply at 77-79.

[444] *Id.* at 79-80.

[445] *Id.* at 80-83.

[446] *Id.* at 83-84.

[447] Bell Atlantic Reply, App. A at Item 28.

[448] Centel Reply at 8-9.

[449] Contel Reply at 28-29.

[450] *Id.* at 23-27.

[451] NYNEX Reply, App. B.4 at 1.

[452] *Id.*, App. B.2 at 1.

[453] Nevada Reply at 19-20.

[454] *Id.* at 22.

[455] SNET Reply at 6-8.

[456] Southwestern Reply at 25-28.

[457] *Id.* at 29-30.

[458] *Id.* at 30-32.

[459] US West Reply at 60-61.

[460] *Id.* at 61-62.

[461] *Id.* at 62.

[462] US West Reply at 63-64.

[463] GTOC Reply at 20-22.

[464] *Id.* at 30.

[465] United Reply at 5-6.

[466] NECA Reply at 2-4.

[467] *Id.* at 4.

[468] *1988 Access Order* at para. 193.

[469] The test period runs from April 1989 through December 1989. Test period data are annualized by multiplying by 4/3.

[470] NECA Description and Justification (D&J) at 5-2-2.

[471] NECA Errata Filing at 11.

[472] NECA Cost Support, Vol. 5 at 5-2-1.

[473] MCI Petition at 15. MCI states that it finds NECA's estimate of originating minutes acceptable. *Id.* at n.19.

[474] A confidence interval is a measure of possible error surrounding the mean forecast of an econometric model, assuming that the model is correctly specified. This method of evaluating the reasonableness of forecasts is the same method used in our analysis of Expenses Less Depreciation and Telephone Plant in Service in this Order, and in our analysis of demand in the *1988 Access Order*.

[475] NECA Cost Support, Vol. 5 at 5-3-2.

[476] Another test is to compare the forecast originating to terminating ratio with the upper bound of a 95 percent confidence interval of the historical originating to terminating ratios of each company. This test identifies the same companies as are identified by the historical maximum comparison.

[477] *See* NYT Cost Support, Vol. 4 at 3-10; NYT D&J, Exhibits 4 & 7; NET Cost Support, Vol. 1 at 2-29, Fig. 2.4.

[478] SNET Cost Support, Vol. 4 at 3-2, 3-3, Table 3-3.

[479] AT&T Petition, App. C-6 at 1.

[480] MCI Petition at 101-02.

[481] Bell Atlantic Reply, App. A at Item 12.

[482] Nevada Reply at 25.

[483] Pacific Reply at 13-14.

[484] *See Waiver Order* at para. 6.

[485] AT&T Petition, App. D-10 at 10-11.

[486] NYNEX Reply, App. H.1 at 1-2.

[487] AT&T Petition, App. D-11 at 1.

[488] Nevada Reply at 25.

[489] Pacific Reply at 10-11.

[490] ALC Petition at 24.

[491] BellSouth Reply at 43 n.105.

[492] NYNEX Reply, App. B.12 at 1-2.

[493] US West Reply at 62.

[494] AT&T Petition at 26.

[495] According to AT&T, BellSouth, NET, and Wisconsin report growth of 36 percent, 25 percent, and 71 percent, respectively, in average monthly demand for DS1 channel terminations, on an annualized basis, for the historical period.

[496] *Id.* at 29 n.*.

[497] *Id.* at 32-33. AT&T states that the ARIMA model also highlights additional significant revenue understatements. *Id.* at 33.

[498] Ad Hoc Petition at 11-12, Table 2 & n.1.

[499] Ad Hoc calculates the differences for these carriers as 8.3 percent, 10.0 percent, and 13.6 percent, respectively. *Id.* at 11. Ad Hoc also notes that these three BOCs report unusually large increases in Marketing and Customer Service Expenses assigned to the special access category. *Id.* at 16, Table 3.

[500] ALC Petition at 21-22; App. 12.

[501] NYNEX Reply at 7-8 & App. B.9.

[502] BellSouth Reply, App. I at 39-42; Southwestern Reply at 33.

[503] *Id.* at 8-9. NYNEX also states that NYT's forecast for WATS four-wire channel termination demand represents only 0.3 percent of its prospective in-service base and is thus too insignificant to affect demand. *Id.* at 9. In contrast, Bell Atlantic states that the regression forecast it used was based on 1988 data and is the same as that used by AT&T. Bell Atlantic concludes, however, that recent information confirms that AT&T's projection is overly optimistic. Bell Atlantic Reply, App. A at Item 31.

[504] NYNEX Reply at 9.

[505] *Id.* at 10. NYNEX states that this decline reflects the impact of AT&T's ReadyLine service and similar open-end services. Ameritech and Bell Atlantic also attribute the decline in WATS demand, at least in part, to these service offerings. Ameritech Reply at 98; Bell Atlantic Reply, App. A at Item 30. Bell Atlantic also states that Pennsylvania's 1989 WATS forecast calls for 26,482 two-wire and four-wire WATS channel terminations, not zero, as ALC contends, and cites to its D&J, DMD 4, page 3.2 of 9.

[506] Ameritech Reply at 93-96. *See also* BellSouth Reply at 39-40. Ameritech also asserts that its projections are supported by current trends. Ameritech Reply at 99.

[507] BellSouth Reply at 41-42.

[508] Ameritech Reply at 99-101.

[509] BellSouth Reply, App. I at 39.

[510] *See* Section V.D.10.d, *supra*.

[511] We estimate that BellSouth's underforecast would result in an overrecovery of $5,685,391.

[512] We estimate that this underforecast of demand would result in an overrecovery of $1,860,627.

[513] We estimate that these underforecasts would result in an overrecovery of $2,021,641.

[514] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, FCC 88-321, released Dec. 1, 1988 (*Strategic Pricing Order*).

[515] AT&T Petition at 34 n.*.

[516] MCI Petition at 66-68 & Exhibit 24.

[517] Ad Hoc Petition at 61-67. Ad Hoc also argues that those carriers that have proposed strategically-set rates for DDS and DS3 access have failed to justify these rates and should be directed to file cost-based rates. *Id.* at 65 n.89 & 67 n.93.

[518] MCI Petition at 68.

[519] *Id.* at 68-69.

[520] US Sprint Petition at 31-32. *See also* ARINC Petition at 5-12 (many proposed rates fail to satisy the Commission's strategic pricing guidelines; moreover, the guidelines fail to safeguard ratepayers and competitors or to encourage network efficiency).

[521] *Id.* at 69-77 (citing Private Line Rate Structure and Volume Discount Practices, CC Docket No. 79-246, 79 FCC 2d 923 (1984) (*Volume Discount Practices Order*)).

[522] MCI Petition at 70 n.93.

[523] *Id.* at 71-74.

[524] *Id.* at 75-77.

[525] Intermedia Petition at 2.

[526] *Id.* at 1. Petitions filed by LOCATE and MFS raise substantially identical arguments. LOCATE and MFS seek rejection or suspension and investigation of the DS1 and DS3 rates proposed by NET, NYT, and Pacific in addition to BellSouth. In addition, LOCATE and MFS argue that the proposed averaged DS3 rates filed by several of the BOCs demonstrate that their prior ICB filings were unnecessary and were filed solely to provide discriminatory and unjustifiably low rates to preferred customers. LOCATE Petition at 8-10; MFS Petition at 8-10.

[527] *Id.* at 3-4.

[528] *Id.* at 6-7.

[529] *Id.* at 7-8.

[530] IDCMA, on the other hand, takes no position on the reasonableness of BellSouth's proposed rates, but concludes that the large rate reductions that BellSouth has proposed are indicative of the "windfall" that BellSouth and other LECs have been reaping under currently-effective rates. IDCMA Letter at 2.

[531] Intermedia Petition at 8-12. Similarly, NCI argues that Southwestern's discount structure and long term contracts are anti-competitive. NCI Petition at 1.

[532] These carriers are BellSouth, Nevada, Rochester, and US West.

[533] BellSouth Reply at 45-49. BellSouth also states that it has not used a lower fill factor for DS1 provided by fiber cable and that Intermedia has erred in its contention that embedded investment in fiber facilities is more than six times the investment in copper. *Id.* at 49-50.

[534] Nevada Reply at 22-24. Rochester's arguments are essentially similar. Rochester Reply at 11-13.

[535] NYNEX Reply at 20-23. *See also* Cincinnati Reply at 20-22; Ameritech Reply at 103-05; Bell Atlantic Reply, App. A, Item 38 at 1-2. Bell Atlantic asserts that comparison of voice grade rates with rates for multiplexed DS1 is meaningless. Bell Atlantic asserts that the crossover point would be one voice grade circuit to one multiplexed DS1 circuit because of the customer's ability to "ratchet" the multiplexed DS1 service.

[536] US West Reply at 44 (footnotes omitted). US West explains that its Target Rates are those rates that it expects to take effect in July 1990, at the conclusion of its transition to regionwide (as opposed to company- or study-area-specific) special access rates. *Id.* at n.76. US West also states that the "crossover point for the Target Rates is within the Commission's determined zone of reasonableness. Independently, [US West's] Target Rates are not strategically priced because no factors other than cost have been used to build these rates." *Id.* at n.77.

[537] *Id.* at 46-47. US West also asserts that its rates are within the range of reasonableness even if multiplexing costs are included. *Id.* at 47-48.

[538] *Id.* at 49-50.

[539] Southwestern Reply at 37.

[540] *Id.*

[541] *Id.* at 41-46, 48-49.

[542] NYNEX Reply at 23-24; App. F.6.

[543] *Id.*, App. F.7 at 1.

[544] *Id.*, App. F.9 at 1.

[545] *Id.*, Apps. F.10 & F.11. NYNEX also asserts that it believes that it is unlikely to receive such an order in any event and notes that the customer would also have the option of ordering service under the averaged tariffed rates. NYNEX concludes that ICB treatment is therefore not discriminatory. *Id.*, App. F.10 at 2.

[546] BellSouth Reply at 50-52.

[547] Bell Atlantic Reply, App. B at 1.

[548] *Id.* at 2-3. Bell Atlantic also justifies its term discounts (*i.e.*, discounts for three- and five-year commitments) by noting that such arrangements can provide savings due to lower facility turnover rates, lower total service order and recordkeeping costs, and potentially lower average non-recoverable costs that may be associated with facilities used for short-term periods. Bell Atlantic does not appear to address the argument that such savings should be reflected in non-recurring charges, since these savings appear to reflect mainly, if not exclusively, non-recurring costs.

[549] *Id.* at 3-4.

[550] *Strategic Pricing Order* at para. 76.

[551] *Id.*

[552] *See id.* at para. 58.

[553] The effect of this RAF will be to reduce Souwthwestern's DS1 rate to be equal to eight times its proposed four-wire voice grade rate.

[554] While we are aware that US West currently is undergoing a transition from individual company rates to region-wide rates, and we have allowed previous filings to take effect in order to implement this transition, we must emphasize that this rate transition does not release US West from the obligation of compliance with applicable Commission Orders. US West should have taken the *Strategic Pricing Order* into account in formulating the transition plan so that rates taking effect on April 1, 1989, would satisfy the requirements of that Order.

[555] *See* MCI Petition, Exh. 24. MCI concludes that MTN's proposed rate for a point-to-point DS1 circuit is 8.11 times its proposed four-wire voice grade rate. US West did not respond to this contention. We will therefore apply a RAF to reduce MTN's rate to an eight to one crossover point. Although Ad Hoc argues that MTN's and NWB's proposed rates exceed the range of reasonableness, we cannot rely upon Ad Hoc's analysis as it is based on rates that include the costs of LEC-provided multiplexing. AT&T provides a crossover calculation that shows that, at 15 miles, MTN's crossover point is nine to one, but that at shorter circuit lengths, the crossover point is in the zone of reasonableness. Because we lack data on average circuit length (a defect that US West would have been best able to cure) we conclude that MCI's analysis is the most reasonable.

[556] NYT Tariff F.C.C. No. 1, Vol. 1 at 7-9 to 7-13. NYT states that in the pricing of DS3 circuit requests above 12, the ICB process affords NYT the necessary flexibility to remain competitive in the "fast evolving high capacity market." *Id.* at 7-13. However, according to NYT, "these sophisticated DS3 circuit designs are the exceptions, not the rule." *Id.*

[557] *Id.* at 7-14 to 7-16.

[558] *Id. See* NET Section 7.4.10(C); NYT Section 7.4.10(C).

[559] *See* NET Section 7.4.5(B); NYT Section 7.4.5(B).

[560] *See* Southwestern Tariff F.C.C. No. 68, Section 20.2.1.

[561] *See* Section 20.3.3.

[562] *See* Section 20.2.3(C)(1) & (2).

[563] *See* Section 20.2.6(F)(2).

[564] Bell Atlantic Tariff F.C.C. No. 1, Volume 3-2 at 3-8.

[565] *Id.* at 3-10 to 3-18.

[566] *See* Section 7.4.13(B).

[567] BellSouth Tariff F.C.C. No. 1, Section 7.5.9(B)(5).

[568] Pacific Tariff F.C.C. No 128, Section 7.5.9. In contrast, Nevada offers all DS3 service solely on an individual case basis. *See* Nevada Tariff F.C.C. No. 1, Section 7.11.5.

[569] Pacific Tariff F.C.C. No. 1, Vol. 1 at 1A.3.6.

[570] US Sprint Petition at 33-35; MCI Petition at 80-83.

[571] US Sprint Petition at 35-36; Teleport Petition at 10-11.

[572] Teleport Petition at 10-12. Teleport also contends that, if non-recurring charges fully recover non-recurring costs (as at least NYT contends they do) then the carrier can be made whole in the event of premature termination of service by a charge equal to the amount of any discount from tariffed recurring charges that the customer had actually received. *Id.* at 11 n.19.

[573] Teleport argues that we should reject the termination liability provisions and other terms (such as lengthy service terms). *Id.* at 8-10.

[574] US Sprint Petition at 36-37.

[575] *Id.* at 37-38; *see also* MCI Petition at 87-88.

[576] Ad Hoc Petition at 22-23.

[577] US Sprint Petition at 38.

[578] *Id.* at 39.

[579] US Sprint states that it is not clear what Southwestern means when it states that ICB charges will apply when its MegaLink Custom Service is provided by "other than normal facilities." US Sprint also believes that the LECs should clarify whether one or two channel termination charges will apply when the customer orders multiplexing. In addition, US Sprint thinks that Southwestern should tariff its charge for case preparation, rather than continuing to charge ICB rates. Finally, US Sprint argues that NET and NYT should offer channel mileage discounts for orders of fewer than 12 and 13 DS3 services, as proposed. *Id.* at 39-41.

[580] MCI Petition at 83-84.

[581] *Id.* at 84.

[582] *Id.* at 84-85.

[583] Bell Atlantic Reply, App. B at 4-5. Bell Atlantic also contends that, because demand for DS3 service has been growing rapidly, its long-term service arrangements will not freeze competitive service providers out of the market. *Id.* at 5.

[584] *Id.* at 5-7.

[585] *Id.* at 7-9.

[586] NYNEX Reply, App. F.8 at 1-2.

[587] Southwestern Reply at 50-54. US West makes a similar point and states that it will request that it be permitted to revise its discontinuance charge provisions to be comparable to those charged by AT&T and MCI. Under this proposal, US West's termination charge would be equal to 50 percent of the monthly recurring charges for the unexpired portion of the fixed period service. US West Reply at 65-67. Southwestern also states that its one-year minimum service obligation is reasonable and notes that terms other than those offered in its proposed tariff would be available on an individual case basis. Southwestern Reply at 54.

[588] Southwestern Reply at 54-56. Southwestern also asserts that fiber optics technology is a distance sensitive technology because costs associated with acquiring rights-of-way, trenching, and placing conduit vary with distance. *Id.* at 55-56.

[589] *Id.* at 56-60. Southwestern also notes that US Sprint can obtain DS3 facilities for later activation pursuant to Southwestern's Special Construction tariff, Tariff F.C.C. No. 69, and argues that it would be inappropriate to duplicate this provision in its access tariff.

[590] *Id.* at 61-65.

[591] *See* BellSouth Tariff F.C.C. No. 1, Section 7.5.9(B)(5).

[592] Ad Hoc Petition at 43.

[593] Networks Petition at 2-6.

[594] Ameritech Reply, App. B at Item 14.

[595] *Id.* at 114-17; BellSouth Reply at App. I, 58-60.

[596] Amendment of Part 69 of the Commission's Rules and Regulations, Access Charges, To Conform It with Part 36, Jurisdictional Separations Procedures, CC Docket No. 87-113, Order on Reconsideration, FCC 88-400, released. Dec. 12, 1988 (*Part 69 Compliance Order*).

[597] AT&T Petition, App. D-12 at 1.

[598] AT&T Comments on Errata Filings, Supp. App. D-12 at 1.

[599] Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, Memorandum Opinion and Order, FCC 88-420, released Dec. 27, 1988 (*Docket 88 - 1 Order*).

[600] ARINC Petition at 13-16.

[601] Ameritech Reply at 6; Bell Atlantic Reply, App. A at Item 1; Centel Reply at 2; Contel Reply at 19-20; NYNEX Reply, App. E.1 at 1; Pacific Reply at 11; US West Reply at 35; GTOC Reply at 10; NECA Reply at 1 n.3.

[602] BellSouth Reply at 61-62, 62 n.150.

[603] Ameritech Reply at 6.

[604] BellSouth Reply at 60-61.

[605] NYNEX Reply, App. E.1 at 1 (citing Annual 1988 Access Tariff Filings, Motion to Extend Time, Pacific Bell Motion for Stay, CC Docket No. 88-1, Phase II, DA 89-9, Order, released Jan. 6, 1989).

[606] *Id.*

[607] AT&T Petition, App. C-4 at 1-2.

[608] NYNEX Reply, App. F.13 at 1.

[609] New York Telephone Company Revisions to Tariff F.C.C. No. 41, Transmittal Nos. 919 and 960, New England Telephone Company Revisions to Tariff F.C.C. No. 40, Transmittal No. 934, Order, DA 89-96, released Jan. 31, 1989.

[610] AT&T Comments on LEC Errata Filings, Supp. App. C-4 at 1-2.

[611] AT&T Petition, App. D-8 at 1.

[612] AT&T Comments on LEC Errata Filings, Supp. App. D-8 at 1.

[613] MCI Petition at 102.

[614] US Sprint Petition at 13 (quoting Annual 1987 Access Tariff Filings, Memorandum Opinion and Order, released Dec. 24, 1986, at para. 79).

[615] *Id.* at 13-14.

[616] Ameritech Reply, App. B at Item 7.

[617] *Id.* at Item 8.

[618] BellSouth Reply at 30.

[619] Cincinnati Reply at 6-7.

[620] NYNEX Reply, App. E.2 at 3-4.

[621] Nevada Reply at 8-10.

[622] Pacific Reply at 14-15.

[623] Southwestern Reply at 15-16.

[624] US West Reply at 10-11.

[625] GTOC Reply at 30.

[626] NECA Reply at 9-10.

[627] AT&T Petition, App. D-9 at 1-3.

[628] Ameritech Reply, App. B at Item 2.

[629] Bell Atlantic Reply, App. A at Item 2.

[630] NYNEX Reply, App. C.7 at 1.

[631] US West Reply at 12.

[632] AT&T Petition, App. D-10 at 1.

[633] *Id.* at 6.

[634] *Id.*, App. H.3 at 1.

[635] Pacific Reply at 9.

[636] AT&T Petition, App. D-10 at 12-13.

[637] *Id.* at 13.

[638] *Id.* at 13-15.

[639] *Id.* at 15-17.

[640] *Id.* at 17-18.

[641] Ameritech Reply, App. B at Item 5.

[642] Bell Atlantic Reply, App. A at Item 23.

[643] BellSouth Reply at 27-28.

[644] NYNEX Reply, App. H.4 at 1.

[645] Southwestern Reply at 69-70.

[646] US West Reply at 30-31.

[647] *See* Ameritech Reply, App. B at Item 5.

[648] *See* AT&T Petition, App. G-1 through G-3.

[649] *See, e.g.*, Ameritech Reply, App. B at Item 6; Bell Atlantic Reply, App. A at Item 14; BellSouth Reply at 31-38; Centel Reply at 5-6 & Attachment 2; Cincinnati Reply at 23-25; NYNEX Reply, App. I.1 through I.3; SNET Reply at 12-13; Southwestern Reply at 16; US West Reply at 39-42; GTOC Reply at 12-16.

[650] *See, e.g.*, BellSouth Reply at 35; NYNEX Reply, App. I.2 at 1-2; US West Reply at 41-42.

[651] *See* AT&T Comments on LEC Errata Filings, Supp. App. G-3.

[652] *Cost Support Order* at para. 20.

[653] MCI Petition at 100.

[654] NYNEX Reply, App. F.12 at 1.

[655] MCI Petition at 89-90.

[656] *Id.* at 91-92.

[657] *Id.* at 92-95. *See id.*, Exhibit 28 for the application of MCI's method of calculation to Ameritech's data.

[658] *Id.* at 96.

[659] LOCATE cites proposed reductions of 24 percent (NET), 10 percent (NYT), and 8 percent (BellSouth). LOCATE Petition at 7.

[660] Ad Hoc Petition at 77-82.

[661] COMPASS Petition at 1. COMPASS states that GTOC has proposed to increase its initial ordering charge by 52 percent.

[662] *Id.* COMPASS also notes that GTOC proposes to increase its special transport rate by 47 percent.

[663] Ameritech Reply, App. B at Item 15.

[664] Bell Atlantic Reply, App. A at Item 39.

[665] *Id.* at Item 41. For specific cost information, *see id.*, Exhibits 41-A through 41-G.

[666] *Id.* at Item 40.

[667] *Id.* (citing Investigation of Interstate Access Tariff Non-Recurring Charges, CC Docket No. 85-166, Phase I, Part 3, 2 FCC Rcd 3498 (1987) (*NRC Order)*).

[668] BellSouth Reply at 56-58; NYNEX Reply, App. G.2 at 1; Pacific Reply at 20-21. Pacific notes that the studies approved by the California PUC are not the same as those approved by the Commission in the *NRC Order*. Pacific Reply at 21.

[669] BellSouth Reply at 56; NYNEX Reply at 24-25, App. G-1 at 1.

[670] SNET Reply at 9. SNET proposed to reduce most NRCs and has increased DS1 NRCs by less than 1.6 percent.

[671] Southwestern Reply at 66-69.

[672] US West Reply at 69-72.

[673] GTOC Reply at 22-23.

[674] *NRC Order*, 2 FCC Rcd at 3501.

[675] Ameritech Operating Companies Tariff F.C.C. No. 2, Access Service Restructure, Transmittal Nos. 221 and 242, Order, DA 88-2056, released Jan. 4, 1989.

[676] *NRC Order*, 2 FCC Rcd at 3502.

[677] MCI Petition at 100-02.

[678] Southwestern Reply at 17 n.31.

[679] MCI Petition at 103-04.

[680] SNET Reply at 11-12.

[681] ALC Petition at 16-19. *See also id.* at App. 7, App. 8, App. 9 (details access line counts of special studies).

[682] Ameritech Reply, App. B at Item 13.

[683] *Id.* at 26-28.

[684] Ameritech Reply at 39-41.

[685] NYNEX Reply, App. C.9 at 1-3.

[686] Southwestern Reply at 17-18.

[687] US West Reply at 13-14.

[688] *Id.* at 15-16 (citing Authorized Rates of Return for the Interexchange Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, Report and Order, released Sept. 30, 1985; Authorized Rates of Return for the Interexchange Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase i, Memorandum Opinion and Order, released Mar. 24, 1986).

[689] *Id.* at 16-17.

[690] For special access, the ICs generally pass through the price changes directly in their unbundled private line rates, so that demand response is calculated based upon individual special access rate changes.

[691] US Sprint Petition at 18-19.

[692] *Id.* at 18-19.

[693] *Id.* at 20-22.

[694] Ameritech Reply at 72-77.

[695] *Id.*, App. B.5 at 1-2.

[696] *Id.*, App. B.3 at 1-2.

[697] Nevada Reply at 17-18.

[698] *See* FCC News Release, "Commission Adopts Incentive Regulation for Dominant Carriers; AT&T Price Cap Plan To Take Effect in July; Further Comments Sought on LEC Price Cap Plan (CC Docket No. 87-313)", issued Mar. 16, 1989.

[699] Nevada Cost Support, Vol. 5.

[700] NYNEX Cost Support, Vol. 5.

[701] Contel Cost Support, Vol. 1 at 41.

[702] *See, e.g., 1988 Access Tariff Order*, 3 FCC Rcd at 1314.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-525

In the Matter of

Amendment of Section 73.202(b), RM-6475
Table of Allotments,
FM Broadcast Stations.
(Marion, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 29, 1989; Released: April 19, 1989

By the Chief, Allocations Branch:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 3 FCC Rcd 6726 (1988), issued in response to a petition filed by Marion Broadcasting Company, Inc. (petitioner), licensee of Station WQIC(FM), Marion, Mississippi. Petitioner proposed the substitution of FM Channel 236C2 for Channel 236A at Marion, Mississippi, and modification of its license to specify the higher class channel.[1] Petitioner filed comments in which it reaffirmed its interest in Channel 236C2. Charisma Radio Partners filed comments. Petitioner filed reply comments.[2]

2. As stated in the *Notice*, Channel 236C2 can be allotted to Marion, Mississippi, in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at the petitioner's specified site. The allotment of Channel 236C2 at Marion would conflict with an application filed by Charisma Radio Partners for Channel 235C2 at Columbus, Mississippi. Channel 236C2 at Marion does not conflict with the reference coordinates of the Columbus allotment (MM 84-231), nor with the three other applications for that allotment. The *Notice* also stated that in the event Channel 236C2 is allotted to Marion, Charisma Radio Partners will be permitted to amend its application to specify a non-short-spaced site without loss of cut-off protection.

3. Charisma Radio Partners (Charisma), applicant for Channel 235C2 at Columbus, Mississippi, filed comments indicating it had no objection to the allotment of Channel 236C2 at Marion provided it would be reimbursed for reasonable expenses it incurs in changing frequencies. Charisma contends that it is Commission policy that the party benefitting from a channel change reimburse an affected party for reasonable costs incurred in changing frequencies, and cites *Notice of Proposed Rule Making and Order to Show Cause*, Woodstock and Broadway, Virginia, MM Docket 88-520, 3 FCC Rcd 6514 (1988).

4. In reply comments, petitioner objects to Charisma's request for reimbursement and asserts that their reliance upon the Notice of Proposed Rule Making for Woodstock and Broadway, Virginia (MM Docket 88-520) is misplaced. Petitioner argues that Commission policy requires reimbursement where an existing station is required to change frequencies to accommodate another station and does not include applications where no frequency change is involved, but only an amendment to change the proposed site.

5. Having considered the proposal and comments filed in this proceeding, we find that the public interest would benefit from the substitution of Channel 236C2 for Channel 236A at Marion, Mississippi. Channel 236C2 can be allotted to Marion, Mississippi, at the petitioner's specified site in accordance with the Commission's spacing requirements.[3] In addition, we will authorize the modification of Marion Broadcasting Company Inc.'s license for Station WQIC(FM), Marion, Mississippi, to specify operation on Channel 236C2. This action is in accordance with Section 1.420(g) of the Commission's Rules. We will not mandate reimbursement of Charisma for its change in transmitter site. Although Commission policy requires reimbursement for the reasonable costs associated with the change in frequency of an existing authorization, applicants are not affected by our reimbursement policy. *See Circleville and Columbus, Ohio*, 8 FCC 2d 159 (1967). In routine allotment proceedings, the Commission has consistently directed the short-spaced applicants to amend their applications to a non-short spaced site, without reimbursement, but with cut-off protection. Here, Charisma Radio Partners will be permitted to amend its application to specify a non-short spaced site without loss of cut-off protection.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 5, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Marion, Mississippi	236C2

7. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Marion Broadcasting Company, Inc. for Station WQIC(FM), Marion, Mississippi, IS MODIFIED to specify operation on Channel 236C2, in lieu of Channel 236A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That the Secretary SHALL SEND a copy of this Report and Order by Certified Mail, Return Receipt Requested. to the following:

Charisma Radio Partners
P.O. Box 540327
Orlando, Florida 32854
(applicant for Channel 235C2
at Columbus, Mississippi, 880616ME)

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] A *Report and Order* was adopted on September 14, 1988, in MM Docket 87-324, which modified the license for Station WQIC(FM), Marion, Mississippi, to specify operation on Channel 236A in lieu of Channel 276A.

[2] Late filed comments were received from SIS Sound, Inc. and Radio Columbus, Inc. requesting expedited processing of this rule making proceeding.

[3] The coordinates for Channel 236C2 at Marion are 32-20-00 and 88-44-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-453

In the Matter of

Amendment of Section 73.202(b), RM-6456
Table of Allotments,
FM Broadcast Stations.
(Franklin, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 3, 1989; Released: April 19, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 5582 (1988), issued in response to a petition for rule making filed by Franklin Community Radio Company (petitioner), proposing the allotment of Channel 297A to Franklin, Texas, as that community's first local FM service. Petitioner submitted supporting comments restating its intention to apply for the channel.

2. Hicks Communications, Inc. (Hicks), licensee of Station KTSR(FM), Channel 221A, College Station, Texas, filed comments and counterproposal requesting consideration of Channel 255A as an alternative channel at Franklin. Hicks urges the allotment of Channel 255A at Franklin, in lieu of Channel 297A, in order to avoid a conflict with its proposal to upgrade the facilities of Station KTSR(FM) in a separate proceeding, MM Docket No. 88-48.

3. In response to Hicks' request, we shall consider Channel 255A at Franklin. Channel 255A can be allotted to Franklin in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules.[1]

4. We believe the public interest would be served by the allotment of Channel 255A to Franklin, Texas, as that community's first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 5, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Franklin, Texas	255A

5. The window period for filing applications will open on **June 6, 1989,** and close on **July 6, 1989.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The reference coordinates are 31-01-36 and 96-29-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-465

In the Matter of

Amendment of Section 73.202(b), RM-6393
Table of Allotments,
FM Broadcast Stations.
(Sitka, Alaska)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 28, 1989; Released: April 19, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 5768 (1988), issued in response to a petition filed on behalf of Alaska Broadcast Communications, Inc. (petitioner), proposing the allotment of FM Channel 276C2 to Sitka, Alaska. Petitioner filed comments in response to the *Notice* reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 276C2 to Sitka, since it could provide an additional FM service to the community.

3. As indicated in the *Notice*, Channel 276C2 can be allotted to Sitka consistent with the minimum distance separation requirements specified in Section 73.207(b) of the Commission's Rules.[1] Additionally, since Sitka is located within 320 kilometers (199 miles) of the U.S.-Canada border, the Commission obtained concurrence of the Canadian Government in the proposal.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 5, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Sitka, Alaska	276C2, 284C2

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 276C2 at Sitka, Alaska, will open on **June 6, 1989,** and close on **July 6, 1989.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates used for Channel 276C2 at Sitka are 57-03-00 and 135-20-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-458

In the Matter of

Amendment of Section 73.202(b), RM-6391
Table of Allotments,
FM Broadcast Stations.
(Ridgecrest, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 28, 1989; Released: April 19, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 3 FCC Rcd 5726 (1988), issued in response to a petition filed on behalf of Bel Air Broadcasting Corporation (petitioner), licensee of Station KZIQ-FM,[1] Channel 224A, Ridgecrest, California, proposing the substitution of Channel 224B1 for Channel 224A and modification of its license accordingly. Petitioner filed comments in support of its proposal. No other comments were received.

2. As indicated in the *Notice*, Channel 224B1 can be allotted to Ridgecrest in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[2]

3. In consideration of the above, we believe the public interest would be served by subtituting Channel 224B1 for Channel 224A at Ridgecrest, California, since it could provide a first wide coverage area FM service to the community. Therefore, and in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the license of Station KZIQ-FM to specify operation on Channel 224B1 in lieu of Channel 224A, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 5, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Ridgecrest, California	224B1,285A

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Bel Air Broadcasting Corporation for Station KZIQ-FM, IS MODIFIED effective **June 5, 1989,** to specify operation on Channel 224B1 in lieu of Channel 224A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The *Notice* incorrectly referred to petitioner's call letters as "KQIZ-FM."

[2] Although the *Notice* indicated that Channel 224B1 could be used at the present site of Station KZIQ-FM at coordinates 35-36-58 and 117-38-35, petitioner advises that it intends to relocate its transmitter to an area at coordinates 35-28-39 and 117-41-57.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-85

In the Matter of

Amendment of Section 73.202(b), RM-6406
Table of Allotments,
FM Broadcast Stations.
(El Dorado, Arkansas;
Bastrop, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 28, 1989; Released: April 19, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Noalmark Broadcasting Corporation (petitioner), licensee of Station KAYZ(FM), Channel 276A, El Dorado, Arkansas, seeking the substitution of Channel 277C1 for Channel 276A and modification of its license accordingly to specify the higher power channel.[1] In order to accommodate the proposal, petitioner requests that Channel 247A be substituted for Channel 277A at Bastrop, Louisiana.[2]

2. A staff analysis of the proposal reaveals that Channel 277C1 can be allotted to El Dorado at the petitioner's suggested site 25.7 kilometers (16 miles) west[3] of the community, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. Moreover, Channel 247A can be used at the site proposed by the Bastrop applicant for Channel 277A.[4]

3. We believe the proposal warrants consideration. Therefore, we shall propose to substitute Channel 277C1 for Channel 276A at El Dorado, Arkansas, and to substitute Channel 247A for Channel 277A at Bastrop, Louisiana. As requested, we also propose to modify the Class A license of Station KAYZ(FM) to specify operation on Channel 277C1. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 277C1 at El Dorado.

4. Additionally, we shall serve a copy of this *Notice* on the applicant for Channel 277A at Bastrop, Louisiana. In the event Channel 277C1 is ultimately allotted to El Dorado, Arkansas, prior to the issuance of a permit for Channel 277A at Bastrop, the applicant may amend his application to specify the new channel. This may be accomplished without loss of "cut-off" status since no upgrade in class of channel will result. *See, Salmanca, NY and Bradford, PA*, 50 FR 26208 (1985); and *Sanibel, FL*, 50 FR 32706 (1985).

5. Accordingly, in order to provide El Dorado with an additional expanded coverage FM service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
El Dorado, Arkansas	227A, 241C1, 257A, 276A	227A, 241C1, 257A, 277C1
Bastrop, Louisiana	230C2, 261C2, 277A	230C2, 247A, 261C2

6. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicant for Channel 277A at Bastrop, Louisiana, as follows:

Max Broadcasting Co.
3712 Cornell Drive
Shreveport, LA 71107

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **June 12, 1989,** and reply comments on or before **June 27, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Dennis P. Corbett, Esq.
Laura B. Humphries, Esq.
Leventhal, Senter & Lerman
Suite 600
2000 K Street, NW
Washington, DC 20006

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall

be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner initially requested the substitution of Channel 277C2 for Channel 276A, but subsequently amended its proposal to specify consideration of Channel 277C1.

[2] Channel 277A was allotted to Bastrop in MM Docket No. 84-231. After the window period for the allotment closed, one application was filed (File No. 880603MQ).

[3] Reference coordinates at the petitioner's suggested site are 33-14-01 and 92-56-27. Petitioner notes that use of its specified site for proposed Channel 277C1 at El Dorado is 141.7 kilometers from its Station KLAZ(FM), Channel 290C1, Hot Springs, Arkansas, at reference coordinates 34-30-19 and 93-05-06. The minimum distance separation required to avoid prohibited 3.16 mV/m (70 dBu) city-grade signal overlap between co-owned Class C1 stations is 100.2 kilometers. Thus, there will be no prohibited overlap of the 70 dBu contours.

[4] Coordinates for Channel 277A at Bastrop at the applicant's specified site are 32-45-46 and 91-57-35.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-86

In the Matter of

Amendment of Section 73.202(b), RM-6604
Table of Allotments,
FM Broadcast Stations.
(San Rafael, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 3, 1989; Released: April 19, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the petition for rule making submitted on behalf of Marin Broadcasting Company, Inc. (petitioner), licensee of Station KTID(FM), Channel 265A, San Rafael, California, requesting the substitution of FM Channel 264A for Channel 265A and modification of its license accordingly.

2. In support of its proposal, petitioner advises that at its present transmitter site,[1] Station KTID(FM) experiences considerable adjacent channel interference from grandfathered Station KIOI(FM), Channel 267B, San Francisco, California.[2] Petitioner asserts that the substitution of channels would permit it to relocate the station's transmitter to a superior site on San Pedro Mountain,[3] at a location 0.6 kilometers further removed from Station KIOI's transmitting location than is the present KTID site. Thus, petitioner adds, a net reduction in signal interaction will result. In further support of its proposal, petitioner claims that at its present site, Station KTID(FM) experiences substantial shadowing within its coverage area due to the mountainous terrain surrounding its transmitter. Petitioner avers that the requested relocation would also benefit the public by enabling it to improve line of sight coverage over its service area.

3. A staff engineering review confirms that Channel 264A can be allotted to San Rafael in compliance with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules at the preferred site specified by the petitioner.

4. In view of the above, we believe the public interest would be served by proposing the substitution of Channel 264A for Channel 265A at San Rafael since it could provide the community with an improved FM service. We also propose to modify the license of Station KTID(FM) to specify operation on Channel 264A.

5. Accordingly, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

City	Channel No. Present	Proposed
San Rafael, California	265A	264A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **June 12, 1989,** and reply comments on or before **June 27, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Roy R. Russo, Esq.
Lauren M. Bloom, Esq.
Cohn and Marks
1333 New Hampshire Avenue, NW
Suite 600
Washington, DC 20036

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates at the present transmitter site of Station KTID(FM) are 37-58-49 and 122-31-39.

[2] Station KIOI(FM) operates with 61 kW ERP at 338 meters (1110 feet) HAAT. Coordinates at its licensed site are 37-41-24 and 122-26-13.

[3] Coordinates at the proposed site for Station KTID(FM) are 37-59-25 and 122-29-58. Petitioner advises that it is not possible for Station KTID(FM) to operate on Channel 265A at its proposed site since it would be 1.3 kilometers short-spaced to Station KYBB(FM), Channel 265A, Tracy, California, at coordinates 37-46-52 and 121-21-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-87

In the Matter of

Amendment of Section 73.606(b) Table of Allotments TV Broadcast Stations (Bessemer and Tuscaloosa, Alabama) — RM-6637

NOTICE OF PROPOSED RULE MAKING

Adopted: April 3, 1989; Released: April 19, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed December 15, 1988, by Channel 17 Associates, Ltd. (petitioner), licensee of television station WDBB(TV), Channel 17, Tuscaloosa, Alabama, to amend the Television Table of Allotments by changing the community of license of Channel 17 from Tuscaloosa to Bessemer, Alabama, and to modify petitioner's license accordingly. Petitioner filed information in support of its proposal.

2. Bessemer (population 31,508),[1] in Jefferson County (population 671,392), is located near the community of Birmingham, Alabama. Bessemer presently has no local television service, whereas two commercial and one noncommercial educational channels are allotted to Tuscaloosa.

3. Petitioner states that it will not move its transmitter site from its present location[2] if the proposed change is approved, as the transmitter provides an 80 dBu signal over Bessemer. UHF TV Channel 17 can be assigned to Bessemer in compliance with the minimum distance separation requirements of Section 73.610 of the Commission's Rules. Furthermore, this proposal is not precluded by the Commission's *Order* in *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 FR 28346 (1987).

4. We believe the public interest would be served by proposing an amendment to the Television Table of Allotments to change the community of license of UHF Television Channel 17, Tuscaloosa, Alabama, to Bessemer, Alabama, as the change would provide Bessemer with its first local television service.[3]

5. We note that the Commission is presently considering an amendment to its Rules that would provide a procedure whereby the Commission could, at the request of a television licensee, amend the Television Tables of Allotments and simultaneously modify its license to specify the new community of license, without entertaining competing expressions of interest or competing applications for the amended allotment. *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 3 FCC Rcd 6890 (1988). Final action on this *Notice of Proposed Rule Making* will be withheld pending resolution of the *FM and TV Authorizations* proceeding.

6. Accordingly, we seek comments on the proposed amendment of the Television Table of Allotments, Section 73.606(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Tuscaloosa, Alabama	17, 33, *39-	33, *39-
Bessemer, Alabama	--	17

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **June 12, 1989,** and reply comments on or before **June 27, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Howard M. Weiss, Esq.
Mark N. Lipp, Esq.
Mullin, Rhyne, Emmons and Topel, P.C.
1000 Connecticut Avenue--Suite 500
Washington, D.C. 20036
(Counsel for the petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549 (Feb. 9, 1981).

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an

ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] All population figures are taken from the 1980 U.S. Census. Petitioner also submits a study which estimates the 1988 population of Bessemer to be 37,907.

[2] The transmitter is located at coordinates of 33-28-51, 87-24-03.

[3] First local television service is preferable to second local television service under our television allotment priorities. *See Sixth Report and Order,* 41 FCC 148, 167 (1952).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Report No. DS-846 **Released: April 19, 1989**

COMMON CARRIER SERVICES INFORMATION

APPLICATION FILING REQUIREMENTS FOR DOMESTIC SATELLITE EARTH STATIONS:

HUBS AND VSATS AT 12/14 GHz

The Commission has detailed the application filing requirements for earth station facilities in *Public Notice*, Report No. DS-610 (2 FCC Rcd 2269 (1987)), revised by *Public Notice*, Report No. DS-637 (2 FCC Rcd 3657 (1987)). This *Public Notice* makes several changes in those *Notices* and should be used when filing for 12/14 GHz small antenna network systems.

FCC Form 403 must be filed when applying for licenses to operate all domestic earth station facilities. In addition, Form 430 (Licensee Qualification Report) must be submitted for transmitting antennas if a current one is not on file with the Satellite Radio Branch. In addition to these forms, other information is required, as described below. Generally, applications should conform to the specifications set forth in Section 1.49 of the Commission's rules, 47 C.F.R. § 1.49. The application's caption should identify the applicant, the city, state and size of the Hub station, and the number of remote units of the VSAT antennas. An original and *five* copies of each filing for a 12/14 GHz Small Antenna System should be submitted to the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. If filing in person, applications should be brought to 1919 M Street, Room L-18.

Entities currently filing applications pertaining to domestic fixed-satellite facilities generally include a description of the application in the accompanying cover letter. This information includes the service involved, the type of request and number of stations involved. To facilitate the determination of appropriate fees, all entities filing domestic earth stations are encouraged to format this information in the manner illustrated below.

Failure to use this format may disrupt or delay processing of the application because the correct fee must be assessed and collected before processing by Common Carrier Bureau staff can be begin. Generally, a flat fee is charged for a blanket VSAT earth station system license regardless of the number of technically identical small antennas contained in the system.

Applications filed on Form 403, requests for waivers, special temporary authority and amendments to pending applications, should clearly indicate *at the top of the cover letter*, the Type of Service, Type of Application, and Number of Stations involved.

Cover letter information should be submitted in the following manner:

Service:

Type of Application:

Number of Stations:

A. The category of Service is as follows:

Satellite System

Note: "Satellite System" is defined as large numbers of technically identical small earth station antennas for which a blanket license may be issued [i.e., VSAT earth station antenna networks operating in the 12/14 GHz band (including Hub station(s))].

B. Type of Application categories are as follows:

1. Initial Station License
2. Modification of License
3. Transfer of License
4. Assignment of License
5. Amendment to Pending Application
6. Special Temporary Authority
7. Extension of Special Temporary Authority
8. Renewal of Station License

Note : "Initial Station License" includes both the construction permit and operating license for earth station facilities.

C. The body of the cover letter should include the following:

"Submitted on behalf of (applicant's name) is an application for a 12/14 GHz Small Antenna Network System."

Networks of very small aperture terminals (VSATs) must meet the requirement set forth in Routine Licensing of Large Networks of Small Antenna Earth Stations Operating in the 12/14 GHz Frequency Bands, Mimeo No. 3588 (released April 9, 1986). Applicants for VSAT networks should generally follow the format for transmit/receive earth station applications. In particular, the information requested in Attachment 1 should be provided for the overall network, the information requested in Attachment 2 should be provided for the Hub station(s), and the information requested in Attachment 3 should be provided for each size small antenna to be covered by the VSAT(s).

Modifications of Existing Systems

When VSAT(s) are added to an existing system, the associated Hub station(s) must be modified. The VSAT modification and the Hub modification should be filed as a single package with appropriate filing fees for each modification submitted.

When additional Hub station applications are filed to operate with specific VSAT(s) in a existing system, identify VSAT by call sign. Be sure the regulatory class coincides.

When VSAT(s) only are added to an existing system (VSAT-to-VSAT)/(point-to-point), identify the associated VSAT(s) by call sign.

If you have any questions concerning the filing of applications for VSAT networks, contact Georgia Mallari or Robert Spillane at (202) 634-1624.

FEDERAL COMMUNICATIONS COMMISSION

ATTACHMENT 1

Narrative Statement for 12/14 GHz
Small Antenna Network Systems
(A VSAT Network)

1) A brief overall description of the nature and operation of the proposed system and the services to be provided.

2) A statement as to whether the facility will have a significant environmental impact pursuant to § 1.1307 of the Commission's rules, which includes radiofrequency (RF) radiation standards, and, if so, an environmental assessment pursuant to § 1.1311.

3) A statement as to whether FAA notification is required pursuant to Part 17 of the rules concerning potential hazard to aviation. If required, a copy of the FAA study should be included or a copy of the notification to the FAA if their study has not been completed.

4) A statement as to how the applicant has obtained the right to use the proposed site.

5) A certificate signed and dated by the technically qualified person responsible for preparing the technical information contained in the application.

(Note: An acceptable format for this certificate is:

I hereby certify that I am the technically qualified person responsible for the engineering information contained in this application, that I am familiar with Part 25 of the Commission's Rules, that I have either prepared or reviewed the engineering information submitted in this Application, and that it is complete and accurate to the best of my knowledge.)

6) The waiver required by Section 304 of the Communications Act.

(47 U.S.C. § 304: "No station license shall be granted by the Commission until the applicant therefore shall have signed a waiver of any claim to the use of any particular frequency or of the either as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.)

7) A clear description of any rule waiver requested in connection with the application together with the justification for the waiver.

8) The name and address of the person to whom correspondence relating to the application should be addressed and, if appropriate, counsel for the applicant.

9) The signature of the a person specified in Section 1.743 of the Commission's Rules.

ATTACHMENT 2

Technical Exhibit for Hub
Transmit/Receive Earth Stations

Form 403 for the Hub Station should indicate, in the upper right hand corner of the form, the type of station and the size of the antenna (*e.g.*, Hub - 6.2 Meter). The Technical Exhibit for the Hub station, set forth below, should follow the Form 403 and should indicate the type of station (Hub) and size of the antenna (in meters) in the upper right hand corner.

Technical Exhibit
Hub Station
(_____ meters)

1) Applicant's Name, Mailing Address and Telephone Number

2) Site Location: Street Address, City, County, State, Telephone Number

3) Point of Contact: Name, Mailing Address and Telephone Number

4) Type of Domestic Service:

(a) Class of station (Fixed *or* Temporary-Fixed Earth Station)

(b) Regulatory Class (Common Carrier *or* Private *or* Developmental)

(c) Type of Facility (Transmit-Only *or* Transmit/Receive)

5) Geographic Coordinates:

(a) Latitude (degrees, minutes, seconds)

(b) Longitude (degrees, minutes, seconds)

6) Frequency Bands: (Receive and Transmit) (12 GHz, 14 GHz)

7) Points of Communications: For U.S. domestic satellites operating within the frequency bands and geostationary arc coordinated for their facilities, the entry "ALSAT" is sufficient. All other satellites must be specifically noted.

8) Site Elevation Above Mean Sea Level: (in feet and meters)

9) Frequency Coordination Limits: (**Note:** Complete *all* of Item 9)

(a) Range of Satellite Arc:

(1) Western Limit (in degrees)

(2) Eastern Limit (in degrees)

(b) Antenna Elevation Angle at:

(1) Western Limit of Arc (in degrees)
(2) Eastern Limit of Arc (in degrees)

(c) Earth Station Azimuth at:

(1) Western Limit of Arc (in degrees)
(2) Eastern Limit of Arc (in degrees)

(d) Maximum E.I.R.P. Density toward the Horizon (Arithmetic sum of the power in dB into the antenna and the maximum antenna gain in dBi in the direction of the horizon.)

10) Transmitting Equipment:

(a) Number of HPAs
(b) Manufacturer and Model No.
(c) Maximum Power Output (in watts)

11) Antenna Facilities:

(a) Statement that antenna conforms to Section 25.209, *i.e.*, 29-25 log theta
(b) Use of Antenna: (Communications and/or TT&C)
(c) Antenna Size: (If circular aperture, *e.g.* parabolic antenna, diameter in meters; If rectangular aperture, *e.g.* TORUS antenna, physical dimensions in meters (height and width) and diameter of circular aperture of equivalent area)
(d) Type of Feed: (cassegrain *or* prime focus *or* other as specified)
(e) Manufacturer and Model No.
(f) Antenna Gain in dBi and frequency at which it is measured:

(1) Transmit (in MHz)
(2) Receive (in MHz)

(g) Antenna Heights

(1) Maximum height above ground (in feet and meters)
(2) Maximum height above mean sea level (in feet and meters))
(3) Antenna centerline above ground level (in feet and meters))
(Note: For *each* Hub station))
(4) If mounted on a building, provide height above structure) in meters, and submit a sketch of site or exemption) statement pursuant to Part 17 of the Commission's Rules.

12) Remote Control Operations (if any): Street Address, City, County, State, Telephone Number

13) Receiving System Noise Temperature: (in Kelvin with applicable antenna elevation angle).

14) Specifics of Operation: Transmitting Mode

(a) Frequency Limits (in GHz)
(b) Earth Station Antenna Polarization
(c) Emission Designator for each r.f. carrier (using new form of designator)
(d) Maximum E.I.R.P. for each r.f. carrier in the mainbeam (in dBW)
(e) Maximum E.I.R.P. Density for each r.f. carrier in the main beam (in dBW/4 KHz)
(f) Description of each r.f. carrier

(Description of digital carriers should include data transmission rate, forward error encoding, r.f. carrier transmission rate and type of modulation. Description of television transmissions should include peak-to-peak frequency deviation, sweep frequency of energy dispersal waveform and carrier frequency.

Some examples for analog transmissions are:

(1) This carrier is frequency modulated by a National Television System Committee (NTSC) video carrier with associated audio
(2) This carrier constitutes an equivalent voice channel FDM/FM system)

ATTACHMENT 3

Technical Exhibit for
Technically Identical Remote Small Antennas
for VSAT earth station(s)

Form 403 for each VSAT Station should indicate, in the upper right hand corner of form, the type of station and the size of the antenna (*e.g.*, VSAT -1.8 meter). The Technical Exhibit for each VSAT station, set forth below, should follow its Form 403 and should indicate the type of station (VSAT) and size of the antenna (in meters) in the upper right hand corner.

Technical Exhibit
VSAT Station
(_____ meters)

1) Applicant's Name, Mailing Address and Telephone Number
2) Point of Contact: Name, Mailing Address and Telephone Number
3) Number of stations to be completed within a 48 month period. (enter number of remote units for each VSAT)
4) Type of Domestic Service:

(a) Class of station (Fixed *or* Temporary-Fixed Earth Station) (for each type of VSAT)

(b) Regulatory Class (Common Carrier *or* Private *or* Developmental)

(c) Type of Facility (Transmit-Only *or* Transmit/Receive)

5) Frequency Bands: (Receive and Transmit) (12 GHz, 14 GHz)

6) Points of Communications: For U.S. domestic satellites operating within the frequency bands and geostationary arc coordinated for their facilities, the entry "ALSAT" is sufficient. All other satellites must be specifically noted.

7) Range of satellite arc for each VSAT station.

8) Transmitting Equipment:

(a) Number of HPAs

(b) Manufacturer and Model No.

(c) Maximum Power Output (in watts)

11) Antenna Facilities:

(a) Statement that antenna conforms to Section 25.209, *i.e.*, 29-25 log theta

(b) Antenna Size: (If circular aperture, *e.g.* parabolic antenna, diameter in meters; If rectangular aperture, *e.g.* TORUS antenna, physical dimensions in meters (height and width) and diameter of circular aperture of equivalent area)

(c) Type of Feed: (cassegrain *or* prime focus *or* other as specified)

(d) Manufacturer and Model No.

(e) Antenna Gain in dBi and frequency at which it is measured:

(1) Transmit (in MHz)

(2) Receive (in MHz)

12) Remote Control Operations (if any):

(a) Street Address, City, County, State, Telephone Number

(b) Indicate whether protected by remote control interlock

13) Receiving System Noise Temperature: (in Kelvin with applicable antenna elevation angle).

14) Specifics of Operation: Transmitting Mode

(a) Frequency Limits (in GHz)

(b) Earth Station Antenna Polarization

(c) Emission Designator for each r.f. carrier (using new form of designator)

(d) Maximum E.I.R.P. for each r.f. carrier in the mainbeam (in dBW)

(e) Maximum E.I.R.P. Density for each r.f. carrier in the main beam (in dBW/4 KHz)

(f) Description of each r.f. carrier

(i) Data Transmission Rate

(ii) Forward Error Encoding

(iii) R.F. Carrier Transmission Rate

(iv) Modulation Type

(v) Maximum Downlink E.I.R.P. Density from the Hub to the VSAT station(s) *or* where no Hub station is proposed, the maximum downlink E.I.R.P. Density for the system.

Before the
Federal Communications Commission
Washington, D.C. 20554

MCI TELECOMMUNICATIONS CORPORATION,
Complainant,

v. File Nos. E-89-88 through E-89-110

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA, *et al.*
Defendants.

ORDER

Adopted: April 11, 1989; Released: April 19, 1989

By the Chief, Common Carrier Bureau:

1. On April 5, 1989 MCI Telecommunications Corporation (MCI) filed a Motion for Extension of Time (Motion) seeking an extension, until September 13, 1989, in which to file replies to answers and oppositions to motions to dismiss in the above-referenced formal complaint proceedings.[1] For the reasons set out herein, we deny the Motion.

2. The Motion argues that MCI's complaints were filed as contingent complaints, specifically to trigger the limitations provision of the Communications Act, 47 U.S.C. § 415, and that the complaints all concern the lawfulness of certain access services and facilities made available to the American Telephone and Telegraph Company (AT&T) pursuant to the Shared Network Facilities Agreements (SNFAs) negotiated between AT&T and the Bell Operating Companies (BOCs) at the time of the AT&T divestiture. Specifically, the MCI complaints allege that the BOCs' Special Access tariffs are unreasonably discriminatory *vis a vis* the SNFAs. Since the lawfulness of the SNFAs is the issue in the Commission's court-mandated review of the BOC Special Access tariffs,[2] MCI argues that the instant Motion should be granted to defer responsive pleadings until information is made available pursuant to the related Special Access investigation. Motion, at 4-5. Otherwise, according to MCI, the Commission must create two parallel SNFA investigative proceedings with a needless duplication of effort and resources. *Id.* MCI acknowledges the Commission's concern that it must, pursuant to the Federal Communications Commission Authorization Act of 1988 (FCCAA), Pub. L. No. 100-594, 102 STAT. 3021, 3023 § 8 (Nov. 3, 1988), resolve the instant complaints within 12-15 months of filing.[3] However, MCI asserts that even if the proposed extension is granted, the Commission still will be afforded at least six months to resolve the complaints. Motion, at 6-7.

3. MCI's arguments are almost identical to those it proffered in a March 22, 1989 motion for continuance which was subsequently denied.[4] In the April 4, 1989 Order denying that previous motion, the Chief, Common Carrier Bureau (the Bureau) rejected arguments that the Commission has any flexibility to postpone resolution of Section 208(b)(1) complaints beyond the 12-15 month period prescribed by the FCCAA.[5] Those same statutory constraints require us to deny the instant Motion.

4. MCI's claim that its requested deferral will allow the Commission sufficient time to resolve the subject complaints pursuant to the requirements of the FCCAA is not supportable. In order to assure sufficient time for discovery and briefing, as well as Commission deliberation, we will shortly call a conference to organize further proceedings in this matter. It is clear that the time required for a fair adjudication of the matters in controversy does not afford us the time claimed by the complainant if its motion is granted.

5. Accordingly, IT IS ORDERED, pursuant to the authority delegated in 47 C.F.R. § 0.291, that the Motion for Extension of Time filed by MCI in the above-captioned formal complaints is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Acting Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] On February 27, 1989 the Chief, Formal Complaints and Investigations Branch, issued a Notice of Formal Complaint serving MCI's complaints on the affected Bell Operating Companies (BOCs) and directing the defendants to file answers by March 29, 1989, with replies and other pleadings scheduled as per Commission Rules governing formal complaints. *MCI v. The Bell Telephone Company of Pennsylvania, et al.*, File Nos. E-89-88 through E-89-110, Notice of Formal Complaint (Feb. 27, 1989).

[2] *See Investigation of Special Access Tariffs of Local Exchange Carriers*, Memorandum Opinion and Order, CC Docket No. 85-166 - Phase I, FCC 86-52, (released Jan. 24, 1986) *rev'd sub nom. MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988).

[3] The FCCAA, *inter alia*, amended Section 208 of the Communications Act to require that complaints which relate to "the lawfulness of a charge, classification, regulation, or practice" of a communications common carrier shall be resolved by the Commission, by issuance of a final, appealable order, within 12 months of the filing of such complaints, or within 15 months thereafter in cases which present questions of fact of "extraordinary complexity." 47 U.S.C. § 208(b)(1).

[4] *See Illinois Bell Telephone Company, et al. v. AT&T*, File No. E-88-73, *et al.* Order, DA-89-345 (released April 4, 1989).

[5] *Id.*, para. 5.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERITECH OPERATING COMPANIES
Revisions to Tariff F.C.C. No. 2

Transmittal No. 274

ORDER

Adopted: April 5, 1989; **Released: April 7, 1989**

By the Chief, Common Carrier Bureau:

1. On February 21, 1989, the Ameritech Operating Companies (Ameritech) filed the captioned tariff revisions which propose individual case basis (ICB) rates and charges for 12 DS3 high capacity services. The proposed revisions were originally scheduled to become effective April 7, 1989, but this effective date subsequently was deferred to May 22, 1989. On March 17, 1989, Ameritech filed additional revisions to its tariff that propose a generalized rate structure for DS3 service.[1]

2. On March 31, 1989 Ameritech filed an application for special permission in which it requests waiver of Section 61.58 of the Commission's Rules, 47 C.F.R. § 61.58, in order to advance the effective date of the captioned tariff revisions.[2] Ameritech asserts that the rates proposed in Transmittal 274 are completely consistent with the rate structure and levels proposed for Ameritech's generalized DS3 service offering in Transmittal 287. Ameritech states further that the minimum service periods proposed for its ICB offerings in Transmittal 274 have been adjusted to be consistent with its proposed generalized DS3 tariff. Ameritech argues that permitting it to advance the effective date of the captioned tariff revisions would allow it to mitigate any inconvenience that its customer would suffer as a result of the deferral of the pending ICB filing.

3. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of local exchange carriers' (LEC) proposed ICB rates, designating for investigation issues concerning the LECs continued use of ICB rates for DS3 offerings and establishing a pleading cycle.[3] Transmittal 274 raises the same issues as those transmittals subject to our *Designation Order*. Therefore, the instant transmittal will be subject to the outcome of that investigation. Although we do not wish to encourage LECs to continue to file ICB tariffs, in view of the fact that Ameritech has made the proposed ICB rates consistent with its pending generalized filing, we will grant its application and allow it to advance the effective date of these proposed revisions to April 10, 1989.

4. Accordingly, IT IS ORDERED that the Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 274 is subject to the investigation instituted in CC Docket No. 88-136.

5. IT IS FURTHER ORDERED that the Ameritech Operating Companies may file tariff revisions, as requested in Application No. 71, to be effective on not less than one day's notice, in order to advance the effective date of the above-referenced transmittal. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 89-252.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

7. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the Ameritech Operating Companies shall keep accurate account of all amounts received pursuant to rates for DS3 services filed under Transmittal 274.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Ameritech Operating Companies, Tariff F.C.C. No. 2, Tr. No. 287, filed Mar. 17, 1989.

[2] Ameritech Operating Companies, Application No. 71, filed Mar. 31, 1989.

[3] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (1988) (*Designation Order*). *See also* Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (1988); Public Notice, Network Communications, Inc., Files Comments on Individual Case Basis Rates for DS3 Services, CC Docket No. 88-136, 4 FCC Rcd 846 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-561

In the Matter of

JACK E. ONDRACEK

Licensee of Radio Station
KRGL(AM)
Myrtle Creek, Oregon

Order to Show Cause Why the
License of Station KRGL(AM),
Myrtle Creek, Oregon
Should Not Be Revoked

ORDER OF REVOCATION

Adopted: April 27, 1989; **Released: May 5, 1989**

By the Acting Chief, Mass Media Bureau:

1. This proceeding began on January 25, 1989, when the Commission released its *Order to Show Cause and Notice of Apparent Liability*, 4 FCC Rcd 818 (1989) (*Order to Show Cause*). The Commission ordered Jack E. Ondracek (hereinafter Ondracek or licensee) to show cause why his license for KRGL(AM) should not be revoked.[1] The Commission specified an issue: "To determine whether Jack E. Ondracek violated Sections 73.1740(a)(4) and/or 73.1750 of the Commission's Rules."[2] The Commission also specified an issue to determine in light of the evidence adduced whether Ondracek possesses the requisite qualifications to remain a Commission licensee. Ondracek has failed to respond to the Commission's *Order to Show Cause* and, thus, pursuant to Section 1.92(a) of the Commission's Rules has waived his right to a hearing. Accordingly, by *Order* released April 17, 1989, FCC 89M-1193, Chief Administrative Law Judge Thomas B. Fitzpatrick terminated this proceeding and certified this matter to the Commission for disposition pursuant to Section 1.92(c) of the Commission's Rules.

2. This revocation is based upon the following uncontested facts. In September 1986, the Commission received information indicating that the captioned licensee had ceased operation of KRGL(AM) in mid-March 1986. Personnel from the Commission's Field Operations Bureau visited the site on November 17, 1986, and found it abandoned. The Commission sent a letter of inquiry to the licensee at the address that appeared in Commission records. The letter, postmarked July 15, 1987, was returned stamped: "Return to Sender-Box Closed."[3] Field Operations personnel revisited the site on March 10, 1988, and again found it abandoned. Thus, it appears that the station has not resumed operation since it left the air in March 1986. Furthermore, the licensee has neither requested Commission permission to remain off the air nor turned in its license, in violation of Sections 73.1740(a)(4) and 73.1750 of the Commission's Rules.

3. The licensee was ordered to file a written notice of appearance within thirty days of receipt of the *Order to Show Cause* in order to avail himself of the opportunity to be heard pursuant to Section 1.91(c) of the Commission's Rules. Ondracek has not filed a notice of appearance, and such failure, alone, constitutes a waiver of the licensee's right to a hearing pursuant to Section 1.92(a)(1) of the Commission's Rules.

4. On February 24, 1989, the Mass Media Bureau mailed its Bill of Particulars to Ondracek. On February 28, 1989, the Bureau mailed Ondracek a Request for Admission of Facts. Both documents were returned stamped: "Undeliverable as Addressed-Forwarding Order Expired." In addition, Ondracek did not appear at the prehearing conference held March 30, 1989. Thus, Ondracek has failed to participate in this proceeding, and has waived his right to a hearing.

5. In view of the foregoing, it is concluded that Ondracek has violated the provisions of Sections 73.1740(a)(4) and 73.1750 of the Commission's Rules. Accordingly, the Commission ORDERS that the license of station KRGL(AM), Myrtle Creek, Oregon, IS REVOKED, effective immediately. This action is taken pursuant to the authority contained in Sections 312(a)(3), (a)(4) and (c) of the Communications Act of 1934, as amended. It is taken by delegated authority.[4]

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Mass Media Bureau

FOOTNOTES

[1] Although the Commission's *Order to Show Cause* included a *Notice of Apparent Liability* for willful or repeated violations of Commission rules, because of the action taken herein, no forfeiture is being imposed.

[2] Section 73.1740(a)(4) provides:

> (4) In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. no later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

Section 73.1750 provides:

The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation.

[3] Section 1.5 of the Commission's Rules requires that the licensee keep the Commission informed of any change in its mailing address.

[4] *See Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n. 3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION — File No. I-T-C-89-065; File No. I-T-C-89-066

Application for authority to lease and operate facilities for service to Pakistan.

Application for authority to lease and operate facilities for service to Portugal.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 27, 1989; Released: May 5, 1989

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on February 23 and 22, 1989, respectively, by MCI Telecommunications Corporation (MCI), request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for direct service to Pakistan and Portugal. The applications were placed on public notice on March 1, 1989. No comments were received. Upon consideration of the applications, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Pakistan and Portugal by MCI.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-89-065 and I-T-C-89-066 ARE GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 24 voice-grade satellite circuits between MCI's Andover, Maine earth station and an appropriate Atlantic Ocean Region (AOR) satellite, connecting with similar circuits between the satellite and an earth station in Pakistan, furnished by MCI's correspondent in Pakistan;

b. own and operate 24 voice-grade circuits in the Andover, Maine earth station;

c. own and operate 24 voice-grade connecting circuits between the Andover, Maine earth station and MCI's West Orange, New Jersey operating center; and

d. use the facilities in a, b, and c to provide MCI's regularly authorized services between the U.S. and Pakistan and beyond;

e. lease from Comsat and operate 24 voice-grade satellite circuits between the Etam, WV earth station and an appropriate AOR satellite, connecting with similar circuits between the satellite and an earth station in Portugal, furnished by MCI's correspondent in Portugal;

f. acquire from AT&T and operate 24 voice-grade circuits in the Etam, WV earth station;

g. acquire by lease and operate 24 voice-grade circuits between the Etam, WV earth station and MCI's West Orange operate center; and

h. use the facilities in e, f and g above to provide MCI's regularly authorized services between the U.S. and Portugal and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between MCI and its correspondents in Pakistan and Portugal, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. This authorization shall be continued year-to-year unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CITY OF PHILADELPHIA File No. 746060
Philadelphia, Pennsylvania File No. LJF-97

For a waiver of the Rules to allow mobile simplex operation on a paired Multiple Address System frequency, on a primary basis

WAIVER

Adopted: April 27, 1989; Released: May 5, 1989

By the Chief, Land Mobile and Microwave Division:

1. The City of Philadelphia (Philadelphia) seeks a waiver of Sections 94.15, 94.63, and 94.65 of the Commission's Rules, 47 C.F.R. §§ 94.15, 94.63, and 94.65, to permit single frequency, one way operation in the 952 MHz band, which is reserved for paired-frequency duplex operation. Philadelphia seeks authority to operate a one-way mobile meter reading Multiple Address System (MAS) on a paired frequency normally reserved for duplex operation pursuant to Sections 94.15(e) and 94.65(a)(1)(ii) of the Commission's Rules, 47 C.F.R. §§ 94.15(e) and 94.65(a)(1)(ii). Section 94.63(d)(5) of the Commission's Rules, 47 C.F.R. § 94.63(d)(5), permits mobile operations in the 952 MHz band on a case by case basis upon a showing that the applicant's mobile requirements cannot be met on existing mobile allocations and upon a showing of no interference to fixed systems. When permitted under Section 94.63(d)(5), however, mobile operations are normally granted on a secondary basis to fixed operations, whereas Philadelphia has applied for primary authority co-equal with fixed stations.

2. Philadelphia requests authority to operate a mobile meter reading MAS system within an area of a 16-mile radius centered in the City of Philadelphia, Pennsylvania. The proposed system would comprise mobile MAS master stations, which would be installed in medium sized vehicles and operated in areas where customer utility meters would be equipped with a low power remote unit authorized under Part 15 of the Commission's Rules, 47 C.F.R. §§ 15.1 through 15.840. The mobile masters would interrogate each remote automatically to obtain readings of natural gas consumption, with interrogation and response occurring in half-duplex fashion. Philadelphia states that it has demonstrated the economic and technical viability of the proposed system by the successful operation of a small experimental prototype, as authorized under experimental station KA2XMJ.

3. Philadelphia certifies in support of its request that, as demonstrated by the frequency engineering analysis it provided, the frequencies in the 956 MHz and 959/928 MHz bands, reserved for simplex operation and available for operation of mobile masters on a primary basis, are not available. Philadelphia pleads, therefore, that it is requesting operation in the 952 MHz band because it is the only remaining MAS spectrum in the proposed service area available to accommodate Philadelphia's automated mobile meter reading requirements. Philadelphia pleads further that its engineering analysis indicates that the proposed system would not cause harmful interference to any existing or applied-for systems since the proposed system would not be co-channel to any other existing or proposed systems with a service area within 70 miles of Philadelphia's proposed service area.

4. Philadelphia states in support of its request for primary authority for the mobile masters that its proposed operation would involve several thousand remote units, with possible expansion to include 520,000 remotes. Philadelphia indicates that, given the magnitude of the planned capital investment necessary for implementing the proposed system, it has serious reservations about installing the system without the interference protection afforded by primary status.

5. In its *Report and Order* in PR Docket No. 87-5,[1] the Commission stated that mobile meter reading technology can be a valuable use of the spectrum. The Commission also noted that mobile meter reading has the potential to benefit consumers by reducing billing problems, increasing the accuracy of meter readings and, ultimately, lowering utility bills. The Commission, moreover, recognized that utility companies cannot be expected to put forth the capital investment necessary to make mobile meter reading succeed if such systems can be licensed only on a secondary basis.[2] The Commission, therefore, afforded mobile meter reading operations primary status on unpaired frequencies. The Commission also provided that in areas where sufficient unpaired spectrum is unavailable, the Private Radio Bureau could consider waivers of the Rules to allow mobile meter reading on the 952 MHz side of a 952/928 frequency pair on a primary basis.[3]

6. Sections 94.15(e), 94.63(d)(5) and 94.65(a)(1)(ii) of the Commission's Rules were adopted to dedicate, and thereby conserve, separate spectrum for single-frequency and paired-frequency MAS operations, and to minimize the potential for interference in connection with mobile MAS operations. Inasmuch as Philadelphia has demonstrated that there are no alternatives within the Rules, and that no harmful interference would result from its proposed mobile meter reading MAS system, the proposed system would not violate the intent of these Rules.

7. Philadelphia has shown a unique need in this case and appears to have no other alternative within the Rules. Without a waiver Philadelphia will not be able to operate its automated mobile meter reading MAS system. The proposed operation, contemplated by the Commission in the *Report and Order*, moreover, would not undermine the purposes of the Rules, which are to maintain the integrity of single-frequency and paired-frequency MAS spectrum and to minimize the potential for interference from mobile operations. We find, therefore, the operation proposed to be in the public interest. *Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

8. Accordingly, pursuant to Section 0.331, 47 C.F.R. § 0.331, and Section 1.3, 47 C.F.R. § 1.3, the City of Philadelphia's request for waiver of Sections 94.15, 94.63, and 94.65 for the referenced application IS GRANTED for an indefinite term.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and Microwave Division

FOOTNOTES

[1] *See Report and Order in PR Docket No. 87-5,* 3 FCC Rcd 1564 (1988).

[2] *Id.* at ¶ 38.

[3] *Id.* at ¶ 39.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

STEPHEN COMMUNICATIONS, INC. File No. 13505-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on E-group channels to serve the Atlanta, Georgia area

MEMORANDUM OPINION AND ORDER

Adopted: April 27, 1989; Released: May 5, 1989

By the Chief, Domestic Facilities Division:

1. The above-referenced application of Stephen Communications, Inc. to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels to serve the Atlanta, Georgia area was selected for qualification review as the result of a Commission lottery. The Committee for Fair MDS Lotteries (Committee) filed a post-lottery Petition to Deny,[1] challenging the application. Stephen Communications, Inc. filed a Reply To Petition to Deny and a Motion for Leave to Submit Typographical Correction.

2. The Committee alleged in its Petition to Deny that Stephen Communications, Inc., together with fifteen (15) other MMDS applicants,[2] engaged in an orchestrated effort to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications. All sixteen of these applicants filed MMDS applications for the Atlanta area. The Committee contends that the events leading up to the filing of these "cookie-cutter" applications, the familial or business relationships among certain applicants, the central role that several of the applicants played in the preparation of the applications, and the similarities in technical and other information among the applications should lead the Commission to conclude that Stephen Communications failed to disclose the identity of the real-party-in-interest to its application in violation of Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a). The Committee claims further that the facts it cites show multiple applications were filed in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), known as the one-to-a-market rule. The Committee also contends that Stephen Communications violated Section 21.900 of the Commission's Rules, 47 C.F.R. § 21.900, by its failure to comply with the affiliation disclosure requirement.

3. In its Reply, Stephen Communications represents that no one other than Stephen Merrill ever held an ownership interest in, or control over, its applications. Stephen Communications argues that because Bruce Merrill does not have an ownership interest and is not and will not be in a position to actually or potentially control the operation of this Atlanta station, there is no violation of the real-party-in-interest rule or the one-to-a-market rule. "Any assistance that Stephen Merrill received from his father was simply a normal incident of a father-son family relation." Reply at 2. Stephen Communications maintains that its Letter of Understanding with Merrill Communications is not a violation of the Commission's affiliation disclosure rule. This Letter of Understanding stated that in consideration of Merrill Communications' overall assistance and its assistance in obtaining financing for construction and operation of any MDS license authorization obtained by Stephen Communications, Stephen Communications agreed to make available to Merrill Communications, consistent with the terms and conditions contained in its final tariff, "six MHz-channels of MMDS transmission service on a 24 hours-a-day, 7 days-a-week basis in any service area for which Stephen Communications obtains the requisite FCC authorization."

4. These allegations by the Committee concerning violations of the real-party-in-interest rule and the one-to-a-market rule are not unique to this particular proceeding concerning Stephen Communications' application to construct and operate this Atlanta MMDS station. These allegations, as applied to Stephen Communications, were considered and rejected by the Commission in *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987) (hereinafter cited as *VCI*). For the reasons provided in that decision, the Committee's Petition to Deny is denied regarding the allegations concerning violations of the real-party-in-interest rule and the one-to-a-market rule.

5. The third issue raised by the Committee, a potential violation of Section 21.900 for failure to disclose an affiliation, was not at issue specifically in *VCI*.[3] For Multipoint Distribution Services, the Commission has defined the terms "affiliated" or "related" as any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the subscriber, excepting only the carrier-user relationship. *Amendment of Parts 1, 2, 21, and 43 of the Commission's Rules and Regulations to provide for Licensing and Regulation of Common Carrier Radio Stations in the Multipoint Distribution Service*, 45 FCC 2d 616, 618 (1974), *recon. denied*, 57 FCC 2d 301 (1975). For purposes of Section 21.900, there has now been sufficient disclosure of any potential affiliation or relationship between Stephen Communications and Merrill Communications, and/or between Stephen Merrill and Bruce Merrill. This MMDS application deficiency with regard to the affiliation disclosure requirements of Section 21.900 has been corrected prior to grant. Therefore, the Committee's Petition to Deny with regard to a potential violation of Section 21.900 is denied.

6. In *VCI*, the Commission held the Letter of Understanding did not place Bruce Merrill in a position of control over, nor give Bruce Merrill a cognizable interest in, the subject applications. Nevertheless, it found that the Letter, despite its disputed legal effect, strongly suggested that the applicants intended to reserve transmission time and channel capacity for the exclusive use of Merrill Communications in consideration of Merrill Communications' assistance in preparing the applications. Hence, the Letter was found to raise questions regarding the applicant's intent to comply with Section 202(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 202(a), that provides "it shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications . . . or to make or given any undue or unreasonable preference or advan-

tage to any particular person . . . ." 47 U.S.C. § 202(a). As a result, the Commission found that the public interest would best be served by imposing a condition on any MMDS authorization issued to VCI or any of the other fifteen MMDS applicants, including Stephen Communications, Inc., requiring the holding out of the service to the public generally for a period of 60 days from the date their formal tariffs are effective. The licensees may not accept Bruce Merrill, or Merrill Communications, or any entity in which Bruce Merrill is affiliated, as a customer-programmer during that 60-day period. After the initial 60-day public offering, Stephen Communications would be free to lease any remaining capacity to Merrill. *See VCI*, 2 FCC Rcd 1900. We remind Stephen Communications that this condition, imposed by the Commission in the *VCI* decision, remains applicable to any MMDS authorization issued to it.

ORDERING CLAUSE

7. ACCORDINGLY, IT IS ORDERED that the Petition to Deny of The Committee for Fair MDS Lotteries is hereby DENIED.

8. This order is issued pursuant Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan, Chief
Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In its Petition to Deny, the Committee incorporated by reference the petition to deny Microband filed in *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987).

[2] The fifteen applicants named by the Committee are B.F. Investments, Inc., Champion Industries, Inc., Fortuna Systems Corp., Line of Site, Inc., Mettler Communications, Inc., Microwave Video Services, Inc., Multi-Micro, Multi-Point Television Distributors, Inc., MWTV, Inc., Paul Communications, Inc., Presco Corporation, Stephen Communications, Inc., Video/Multipoint, Inc., Virginia Communications, Inc., Walter Communications, Inc., and Wireless Services, Inc.

[3] The *VCI* order considered a related issue of an alleged violation of Section 21.903(b)(2) of the Commission's Rules, 47 C.F.R. § 21.903(d)(2), the prohibition against programming of more than fifty percent (50%) of capacity by an "affiliated" entity.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-164

In the Matter of

Amendment of Section 73.202(b), RM-6245
Table of Allotments,
FM Broadcast Stations.
(Woodbury, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 24, 1989; Released: May 5, 1989

By the Chief, Allocations Branch:

1. Pursuant to the request of Bart Walker (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 2250 (1988), proposing the allotment of Channel 285A to Woodbury, Tennessee, as that community's first local FM service. Petitioner filed comments reaffirming his interest in constructing and operating a broadcast facility at Woodbury. John M. Barrick ("Barrick"), licensee of Station WOVO(FM), Channel 288A, Glasgow, Kentucky, responded to the *Notice* with a counterproposal to substitute Channel 285C2 for Channel 288A at Glasgow and provide Glasgow with its second wide coverage area FM service. Barrick also requested the modification of his station's license to specify operation on the higher powered frequency. In order to accomplish the upgrade at Glasgow, Barrick suggested the substitutions of Channel 300A for Channel 285A, presently used by Station WJRS(FM) at Jamestown, Kentucky and Channel 282A for Channel 285A, presently used by Station WKHG(FM) at Leitchfield, Kentucky. Barrick and petitioner filed reply comments.[1] Kenneth H. Goff, licensee of Station WKHG(FM) at Leitchfield, and Lake Cumberland Broadcasters, licensee of Station WJRS(FM) at Jamestown, each filed reply comments stating their opposition to the counterproposal.

2. In our examination of Barrick's counterproposal we determined that it is technically defective and unacceptable for consideration. Channel 285C2 cannot be allotted to Glasgow at Barricks's proposed site consistent with the Commission's spacing requirements due to short spacings to Station WGFX(FM), Channel 283C1 at Gallatin, Tennessee, and Station WCLC-FM, Channel 286A, Jamestown, Tennessee. Our engineering analysis concludes that it is impossible to site Channel 285C2 at Glasgow because it requires protection of not only the Gallatin station, but also Station WKYW(FM), Channel 285A at Frankfort, Kentucky. Any site avoiding short spacings to the stations at Gallatin and Frankfort, would create short spacings to Station WITZ-FM, Channel 284B, Jasper, Indiana, and Station WPKY-FM, Channel 285A at Princeton, Kentucky. Therefore, Channel 285C2 cannot be allotted to Glasgow in compliance with Section 73.207 of the Commission's Rules. Furthermore, in view of our determination there is no need to comparatively consider the counterproposal to the Woodbury proposal.

3. Based on the information before us, we believe the public interest would be served by the allotment of Channel 285A to Woodbury, Tennessee, as that community's first local FM service. *See e.g. Newberry and Munising, Michigan*, 52 FR 33593, September 4, 1987. The channel allotment can be made in compliance with the Commission's minimum distance separation requirements with a site restriction. A site restriction 5.4 kilometers (3.4 miles) northwest of the city is necessary in order to avoid a short spacing to Station WTCX, Channel 285A, Dayton, Tennessee.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 19, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Woodbury, Tennessee	285A

5. The window period for filing applications will open on **June 20, 1989,** and close on **July 20, 1989.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Petitioner's reply comments were untimely filed. Therefore, they shall not be considered. *See* Section 1.415(d) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-99

In the Matter of

Amendment of Section 73.202(b), RM-6640
Table of Allotments,
FM Broadcast Stations.
(North Crossett, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 24, 1989; Released: May 5, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Contemporary Communications (petitioner), permittee of Station KWLT(FM), Channel 274A, North Crossett, Arkansas, seeking the substitution of Channel 274C2 for Channel 274A and modification of its permit accordingly to specify the higher power channel.[1]

2. A staff engineering analysis reveals that Channel 274C2 can be substituted for Channel 274A at North Crossett in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 12.4 kilometers (7.7 miles) west[2] of the community to avoid short-spacing to a rule making proposal to allot Channel 273A to Gould, Arkansas,[3] as that community's first local broadcast service (RM-6582). This site also meets the minimum distance separation requirements to Station WMSI(FM), Channel 275C, Jackson, Mississippi.[4]

3. In light of the above, we shall propose to substitute Channel 274C2 for Channel 274A at North Crossett, Arkansas, as requested. Additionally, we shall propose to modify the Class A permit of Station KWLT(FM), in the event Channel 274C2 is substituted for Channel 274A at North Crossett. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, modification of the permit of Station KWLT(FM) may be implemented without demonstrating the availability of an additional equivalent channel for use by other interested parties.

4. Accordingly, in order to provide North Crossett with its first expanded coverage FM service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
North Crossett, Arkansas	274A	274C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 26, 1989,** and reply comments on or before **July 11, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Larry G. Fuss
Contemporary Communications
P.O. Box 4010
Opelika, AL 36803

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b), 73. 504 and 73. 606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] In order to accommodate the proposal, petitioner also requested that an alternate channel be substituted for Channel 277A at Bastrop, Louisiana. We have recently proposed the substitution of Channel 247A for Channel 277A at Bastrop in order to accommodate a proposal to modify the facilities of Station KAYZ(FM), Channel 276A, El Dorado, Arkansas, in RM-6406.

[2] Coordinates used for Channel 274C2 at North Crossett are 33-08-23 and 92-04-14.

[3] Although petitioner suggested a site at coordinates 33-10-00 and 92-03-00, it does not meet the minimum distance separation requirements to the Gould, Arkansas, rule making proposal.

[4] Coordinates at the licensed site for Station WMSI(FM) are 32-12-46 and 90-22-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-98

In the Matter of

Amendment of Section 73.202(b), RM-6638
Table of Allotments,
FM Broadcast Stations.
(Davis and Winters, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 24, 1989; Released: May 5, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed by Eric R. Hilding, d/b/a Hilding Communications (petitioner), seeking the allotment of FM Channel 288A to Winters, California, as that community's first local broadcast service. In order to permit the use of Channel 288A at Winters, petitioner requests the substitution of Channel 282A for Channel 288A at Davis, California, licensed to KYLO Radio, Inc., ("KYLO") for Station KYLO(FM).

2. We believe the proposal warrants consideration in view of the petitioner's expressed desire to provide a first local broadcast service to Winters, California. A staff engineering analysis reveals that Channel 288A can be allotted to Winters, California, consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited in an area at least 3.6 kilometers (2.2 miles) north[1] of the community to avoid short-spacing to Station KITS(FM),[2] Channel 287B, San Francisco, California. Channel 282A can be used at the site proposed by Station KYLO(FM).[3]

3. Where the allotment of a new channel requires that an existing station change its channel of operation, the Commission generally will not propose the allotment if the channel change would also require the existing licensee to relocate its transmitter, unless the affected licensee states its agreement to the relocation prior to the initiation of the rule making proceeding. *See Claremore, Oklahoma, et al.*, 3 FCC Rcd 4037 (1988). Petitioner provided a letter from KYLO indicating its support of the proposal. Therefore, we have accepted KYLO's letter as its consent to the channel change and relocation at Davis. As a result, we will not issue an order to show cause to KYLO but will serve it with a copy of this *Notice*.

4. Whenever an existing licensee is ordered to switch frequencies in order to accommodate a new channel allotment, Commission policy requires the benefiting party, or parties, to reimburse the affected station for costs incurred therewith. Therefore, if Channel 288A is ultimately allotted to Winters, or any other channel to another community as a result of any successful counterproposal which would likewise require Station KYLO(FM), Davis, California, to move from Channel 288A and to relocate its transmitter, then the successful permittee will be required to reimburse KYLO accordingly. Petitioner notes its awareness of the reimbursement requirement.

5. Accordingly, in order to provide Winters with the opportunity to receive its first local broadcast service, we shall propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Davis, California	288A	282A
Winters, California	--	288A

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice* to KYLO Radio, Inc., P.O. Box 189, Davis, California 95616.

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **June 26, 1989,** and reply comments on or before **July 11, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Eric R. Hilding
Hilding Communications
P.O. Box 1700
Morgan Hill, CA 95037

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b), 73. 504 and 73. 606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the

proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates for Channel 288A at Winters are 38-33-17 and 121-57-12.

[2] Coordinates at the licensed site of Station KITS(FM) are 37-41-20 and 122-26-07.

[3] Coordinates at the proposed site for Station KYLO(FM) are 38-35-20 and 121-43-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-331

In re Applications of

MONTGOMERY COUNTY MEDIA NETWORK d/b/a IMAGISTS — File No. BPCT-841129KF

CARMEN MATIAS AND ANDREW N. WIMBISH, JOINTLY — File No. BPCT-841129KK

WOOD BROADCASTING COMPANY — File No. BPCT-841129KW

G-A COMMUNICATIONS, INC. — File No. BPCT-841129LE

For Construction Permit
Conroe, Texas

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1989; Released: May 5, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. In a *Memorandum Opinion and Order*, FCC 89R-17, released March 29, 1989 ("*Order* "), the Review Board requested the parties to file supplemental briefs addressing the question of the applicability, *vel non*, of collateral estoppel to the real-party-in-interest issue specified against G-A Communications, Inc. ("G-A") in this television licensing proceeding. In response thereto, on April 13, 1989, G-A and Imagists filed supplemental briefs, and Carmen Matias and Andrew N. Wimbish, Jointly ("Matias and Wimbish") filed a supplemental brief on the following day. All four applicants have filed reply briefs. After reviewing these briefs, we have determined that the doctrine of collateral estoppel may not be applied to G-A under the facts of this case without infringing upon its fundamental due process rights, but that a remand of this proceeding is nonetheless necessary, as explained below.

2. As our *Order* recounted, the real-party-in-interest issue herein had its genesis in the earlier proceeding of *Opal Chadwell*, 2 FCC Rcd 5502 (Rev. Bd. 1987), *remanded on other grounds*, 65 R.R.2d 1498 (1989). There, applicant Dorothy O. Schulze and Deborah Brigham, A General Partnership ("Schulze and Brigham") faced an issue to determine whether it misrepresented or had lacked candor in reporting the television broadcast applications of Schulze. In response to the specific allegation that Schulze had failed to report her ownership interest in the instant G-A application for Channel 55 in Conroe, Texas, Schulze and Brigham relied, in part, on the declaration of Jo Ann Garcia, president and sole voting stockholder of G-A. Garcia testified in the *Opal Chadwell* proceeding that she did not previously know Schulze, and had never contemplated having her as a party to G-A's application. However, the ALJ in that proceeding disbelieved the testimony of both Schulze and Garcia, as well as that of Richard Ozan, the brother of both Schulze and G-A's purported sole non-voting (80% equity) stockholder, Elizabeth Anderson. Instead, the *Opal Chadwell* ALJ disqualified Schulze and Brigham for misrepresentation, finding (*inter alia*) that Ozan had filed a number of television applications -- including the instant G-A application -- using various females as false fronts. In reaching that determination, the *Opal Chadwell* ALJ specifically found that Garcia's testimony about her own participation in the instant G-A application was a "web of lies." *Opal Chadwell*, 1 FCC Rcd 120, 126 (ALJ 1986). Subsequently, the Board affirmed the ALJ's disqualification of the Schulze and Brigham applicant, holding that the "case turns on the patently misleading testimony presented by Schulze . . . and Garcia concerning their purported extensive participation in the preparation and prosecution of the applications and the absence of any meaningful participation by Richard Ozan." *Opal Chadwell*, 2 FCC Rcd at 5509. The Board there found that the Schulze and Brigham posture was summed-up by a colloquy at oral argument, a portion of which is excerpted here:

> [Counsel for Schulze/Brigham]: My client in this case started out the innocent victim of an application mill . . . .
>
> [Board Member]: Mr. Martin, you have characterized Ms. Schulze as an innocent victim of an application mill. I find her, on the basis of this record, to be neither innocent, nor a victim . . . .

Id. at 5510. On review, the full Commission specifically upheld the Board's denial of the Schulze and Brigham application: "We find no error in the Board's treatment of the existing record in this case," 65 RR 2d at 1499, including incidentally the conclusions by the ALJ and the Board that Garcia had lied about her participation in this instant G-A application.

3. Because it was found in *Opal Chadwell* that the Schulze and Brigham application, as well as the instant Garcia application for Conroe, were both products of Richard Ozan's "application mill," and that Garcia had lied there about her role in this G-A application, which is just now before the Board on exceptions for consideration with other competing applicants for Channel 55 at Conroe, the Board inquired of the instant parties whether the doctrine of collateral estoppel might apply, so as to obviate the relitigation of the misrepresentation questions which were determined adversely to Garcia in the prior *Opal Chadwell* proceeding. However, since the ALJ presiding in the instant Conroe proceeding resolved the cognate real-party-in-interest issue favorably to G-A, and found Garcia's testimony to be credible, the question is raised as to how to properly deal with this situation.

4. *Collateral Estoppel.* "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an

adequate opportunity to litigate," the principles of *res judicata* and collateral estoppel apply "to prevent relitigation of factual disputes" resolved by the agency. *United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966). The Court of Appeals has upheld Commission invocation of collateral estoppel in licensing cases. *E.g., Gordon County Broadcasting Co. v. FCC*, 446 F.2d 1335, 1338 (D.C. Cir. 1971). Whereas *res judicata* (or "claim preclusion") prevents relitigation of the same cause of action, collateral estoppel prevents relitigation of issues that were previously tried, and is therefore often referred to as "issue preclusion." 1B Moore's *Federal Practice*, Section 0.441 [2] at 722-724 (2d ed. 1984); *see also Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n. 5 (1979). In general, for collateral estoppel to apply, four essential elements must be present:

> (1) an issue identical to one that was previously litigated and that was essential to the previous decision;
>
> (2) the prior adjudication must have reached the stage of being a final judgment on the merits;
>
> (3) the party to be estopped must have been a party to the prior litigation, or in privity with such a party;
>
> (4) the estopped party must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Yates v. United States, 354 U.S. 298 (1957); *Oldham v. Pritchett*, 599 F.2d 274 (8th Cir. 1979); *see also Parklane Hosiery Co., Inc. v. Shore, supra; RKO General, Inc.*, 82 FCC 2d 291, 313 (1980); *see generally* 1B *Moore's Federal Practice, supra*, at 725 n. 14; 4 Davis, *Administrative Law Treatise*, Chapter 21 (2d ed. 1983); 18 Wright, Miller and Cooper, *Federal Practice and Procedure*, Section 4416 at 137-138 (1981). Because, as will be shown below, elements (1), (3), and (4) are not present in this case,[1] collateral estoppel may not be applied.

5. *No Identity of Issue*. To begin, the *Opal Chadwell* case involved a misrepresentation/lack of candor issue specified against Schulze and Brigham. By contrast, a real-party-in-interest issue was litigated directly against G-A in this instant case. The *Opal Chadwell* ALJ did, of course, find that Garcia had lied as a witness in that prior case, and both the Board and the Commission upheld this collateral finding on appeal. However, Garcia, as a mere witness, did not have the opportunity there to personally challenge that misrepresentation finding; and the separate question of whether she had lied as a witness in the *Opal Chadwell* case was not litigated in the instant proceeding.

6. *Lack of Privity*. Neither G-A nor Garcia, personally, were parties to the *Opal Chadwell* proceeding; and they may not be bound thereby unless they were "in privity" with Schulze and Brigham, the relevant party in that case. *See Parklane Hosiery*, 439 U.S. at 327 n. 7. "The term 'privity' signifies that the relationship between two or more persons is such that a judgment involving one of them may justly be conclusive upon the others, although those others were not party to the lawsuit." *Gill & Duffus Services, Inc. v. A. M. Nural Islam*, 675 F.2d 404, 405 (D.C. Cir. 1982). While admitting that privity is an "elusive concept," the court set forth the following representative definitions of that term as it applies in a collateral estoppel context:

> [T]he word ["privity"] designates a person so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved.
>
> * * *
>
> Privity is clearly established by the identity of cause of action and of interest in the two cases. Privity is "the mutual or successive relationship to the same rights of property."
>
> * * *
>
> The test of privity is whether [a party] participated in control of an action, individually or in cooperation with others, to establish and protect some proprietary or financial interest of his own.

Id. at 405-406 n. 3 (case citations omitted). We must conclude that neither Garcia nor G-A can be found to have been in privity with Schulze and Brigham in the *Opal Chadwell* case.

7. First, neither Garcia nor G-A has any legal right or interest in the Schulze and Brigham application for Blanco, Texas. While the *Opal Chadwell* decision did find that a third party, Richard Ozan, was an undisclosed principal in both applications, that case did not conclude that Schulze and Brigham had a legal interest in the instant G-A application. As previously pointed out, the Schulze and Brigham application was a focal point of the *Opal Chadwell* case, but the G-A application for Conroe, of course, was not. That is, the first two tests of privity -- "same legal right" and "mutual or successive relationship to the same rights" -- are not met here. In addition, the third test (*i.e.*, participation in control of the earlier action) is also not met. It is undisputed that neither G-A nor Garcia controlled the prosecution of the Schulze and Brigham application in the *Opal Chadwell* proceeding. *Compare Montana v. U. S.*, 440 U.S. 147, 153-155 (1979) (U.S. found to have controlled previous lawsuit by contractor where it: (1) required the suit to be filed; (2) reviewed and approved the complaint; (3) paid the attorneys' fees and costs; (4) directed the previous appeal to the Montana Supreme Court; (5) appeared and submitted a brief as *amicus* in that appeal; (6) directed the filing of a notice of appeal to the U.S. Supreme Court in the previous suit; and (7) effectuated contractor's abandonment of that appeal on advice of the U.S. Solicitor General). Garcia's only involvement in the *Opal Chadwell* proceeding was as a witness, which -- standing alone -- is insufficient to confer "privity" status upon her. *See Bryson v. Guarantee Reserve Life Insurance Company*, 520 F.2d 563, 567 (8th Cir. 1975); *accord Benson and Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1174-1175 (5th Cir. 1987); *cf. A. S. D. Answer Service, Inc.*, 65 R.R.2d 31, 33 (1988) (applicant-corporation had been found to be real-party-in-interest and to have lacked candor and misrepresented facts to Commission; any principal thereof "can fully test those findings in any subsequent proceeding concerning his qualification to be a licensee.").

8. *Insufficient Opportunity to Litigate Previously*. Garcia did not have a "full and fair opportunity to litigate" the misrepresentation findings against her in the *Opal*

Chadwell proceeding. She undisputedly had no control of that previous litigation, having had "no effective choice as to the legal theories and proofs . . . advanced . . . [and no] opportunity to obtain review." *Benson and Ford*, 833 F.2d at 1174. Even had Garcia attempted to intervene in her own right as a party in that prior proceeding, such a request would almost certainly have been denied. *See WKKQ, Inc.*, 94 FCC 2d 482 (Rev. Bd. 1983) (denying witness' attempt to intervene in order to vindicate personal interests and professional reputation); *accord Seven Hills Television Co.*, 2 FCC Rcd 6867, 6889 (Rev. Bd. 1987) (intervention to protect reputation not permitted). Moreover, Schulze and Brigham may not be construed to have been a "virtual representative" of Garcia (or G-A), because there is no evidence that there was any express or implied legal relationship by which the former was accountable to the latter. *Benson and Ford*, 833 F.2d at 1175.

9. *Necessity for Remand.* Nonetheless, despite the established inapplicability of collateral estoppel here, we must now address the residual question of whether Garcia did, in fact, lie as a witness in the *Opal Chadwell* proceeding; and, if so, what effect such misrepresentation has upon G-A's basic qualifications to be a licensee. *See generally Character Policy Statement*, 102 FCC 2d 1179, 1188-1191, 1195-1196, 1210-1211, 1227-1229 (1986).

10. In the Conroe *I. D.*, paras. 107-125, 140-143, the ALJ reviewed the testimony of Garcia and former G-A counsel, Thomas L. Root. In essence, Garcia testified that she was the sole active "real party" behind G-A's application, and that Richard Ozan (brother of G-A's purported limited partner Elizabeth Anderson) had no role whatsoever in prosecuting the application. Root testified that he did not recall whether or not he had certain conversations with Garcia, Ozan, and Anderson, and he claimed he did not recall the content of those conversations and various other important matters concerning the application. The ALJ found Garcia's testimony "believable," and resolved the real-party-in-interest issue favorably to G-A. *Id.*, para. 143. Garcia's Conroe testimony was essentially replicative of the testimony she gave in the *Opal Chadwell* proceeding, which testimony was found in that *Initial Decision* to be a "web of lies," and wholly refuted by contrary testimony given by Root, Ozan, and Ron Baptist. *Opal Chadwell*, 1 FCC Rcd at 124-126. The Commission cannot blithely ignore an obvious negative "predictive judgment[ ] relating to an applicant's propensity to deal honestly with the Commission and to comply with our rules and policies." *Character Policy Statement*, 102 FCC 2d at 1232. Therefore, we shall remand this proceeding to the presiding ALJ on an issue to determine whether, in the *Opal Chadwell* proceeding, Ms. Garcia lied as a witness; and, if so, the effect thereof upon G-A's basic qualifications to be a licensee. Because, as noted above in paragraph 2, the *Opal Chadwell Decision* found that Richard Ozan ran an "application mill" of which the instant G-A application appeared to be a product, and the existence of that "mill" was reconfirmed at oral argument by G-A's current counsel,[2] we invite the Commission's Mass Media Bureau to participate fully in the remanded proceeding in order to protect the integrity of the Commission's processes. *See generally Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301) (Gen.Docket No. 88-328), Report and Order*, FCC 89-110, released April 20, 1989; *Inquiry Into Alleged Abuses of the Commission's Processes*, 3 FCC Rcd 4740 (1988).

11. The Board obviously recognizes the anomaly in having the Conroe ALJ litigate the question of whether an instant applicant principal lied (as a witness) in a prior comparative case, but there appears to be no alternative: *first*, and as we have found, we cannot apply the doctrine of collateral estoppel against Garcia (or G-A) in the instant proceeding, based upon the incidental findings and conclusions adverse to Garcia in *Opal Chadwell; second*, we cannot ignore the prior findings and conclusions affirmed by the Board and the full Commission, that Garcia lied about G-A's Conroe application in *Opal Chadwell*. In another recent case, *Ocean Pines FM Partnership*, FCC 89R-22, released April 13, 1989, this Board refused to delete an ALJ's addition of an issue based upon adverse real-party-in-interest findings concerning a common principal in a contemporary case, *Key Broadcasting Corp.*, 3 FCC Rcd 6587 (ALJ 1988) *(Initial Decision)*. *The Key Broadcasting* ALJ had previously found that one Dr. Berger, also an applicant in *Ocean Pines*, had been the real-party-in-interest in a *Key Broadcasting* applicant. Although the *Key Broadcasting Initial Decision* was then before the Board on exceptions to those adverse findings, we found that the *Ocean Pines* ALJ was perfectly correct in taking cognizance of the adverse findings and conclusions against Dr. Berger in the *Key Broadcasting* case, so as to obviate the relitigation of Dr. Berger's *Key Broadcasting* conduct, *again*, in the *Ocean Pines* proceeding. We held that, should Dr. Berger be exonerated in the lead *Key Broadcasting* case, no adverse consequences would befall his *Ocean Pines* application based upon his *Key Broadcasting* activity. Despite the fact that Dr. Berger argued to the Board in his *Ocean Pines* appeal that the presiding ALJ's addition of the *Key Broadcasting* issue therein would stimulate a relitigation of the real-party-in-interest issue, our intent was the *exact opposite: viz.*, that the adverse *Key Broadcasting* findings and conclusions would not be relitigated in *Ocean Pines*. Unless and until *Key Broadcasting* was reversed or modified, the findings and conclusions in that case were binding in the *Ocean Pines* proceeding. This is the conventional and far better application of collateral estoppel.

12. However, unlike *Ocean Pines/Key Broadcasting* – where Dr. Berger was a common *principal* with a full opportunity to litigate the adverse holdings against him – Garcia was merely a witness in the *Opal Chadwell* case, and therefore without an unfettered litigative opportunity therein. The *Ocean Pines* paradigm is thus unavailable in this Conroe proceeding. Hence, just as in a vast multitude of routine cases where collateral estoppel is unavailable, *(see supra* paras. 4-8), the question of Garcia's truthfulness in *Opal Chadwell* must be relitigated in a forum that affords her all due process rights. Moreover, neither the ALJ nor reviewing authorities may be prejudiced in trying the issue we add below by virtue of the findings and conclusions anent Garcia in *Opal Chadwell*. The discrete issue we add here is to be tried afresh; and upon any review, we will yield our customary deference to the credibility findings of this presiding ALJ, *see TeleSTAR, Inc.*, 2 FCC Rcd 5, 12-13 (Rev. Bd. 1987) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951)), even though they may differ from those relating to Garcia in *Opal Chadwell*.

13. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED to the presiding Administrative Law Judge for the issuance of a Supplemental Initial Decision upon the following issue:

To determine whether Jo Ann Garcia lied to, misrepresented facts to, or lacked candor with the Commission in the Blanco, Texas comparative television (Channel 52) proceeding (MM Docket No. 85-269), *Opal Chadwell*, 1 FCC Rcd 120 (ALJ 1986) (Initial Decision), 2 FCC Rcd 5502 (Rev. Bd. 1987), (Decision), *on review*, 65 R.R.2d 1498 (1989); and, if so, the effect thereof on the basic qualifications of G-A Communications, Inc. to be a Commission licensee.

Both the burden of proceeding with the introduction of evidence and the burden of proof shall be on G-A Communications, Inc.[3]

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Because the *Opal Chadwell* proceeding is "final" through the Commission level of appeal, we believe that element (2) is satisfied for collateral estoppel purposes. *See RKO General, Inc.*, 82 FCC 2d at 315.

[2] The following colloquy between the Board and G-A's current counsel (who also represented Schulze and Brigham before the Board in the *Opal Chadwell* proceeding, *see supra* para. 2) occurred:

[Board Member]: Mr. Martin, before you commence your argument on this particular case, I recall to you that many of the *dramatis personae* at play in this case involving your applicant made premier appearances before this Board in the now renowned case of *Opal Chadwell*. And in your oral argument in the *Opal Chadwell* case you pleaded for mercy for your client, whom the Board disqualified because Mr. Ozan was involved, Miss Garcia. And you said, to wit, as follows, I am quoting from Paragraph 36 now of our Initial Decision. You said "My client in this case started out the innocent victim of an application mill." Would you refresh our memories, Mr. Martin, who were the protagonists of that application mill and what were their roles?

[Counsel for G-A]: The principal person, I believe, I had in mind was Ron Baptiste.

* * *

[Board Member]: Ron Baptiste. What about Mr. Ozan. Was he an unindicted co-conspirator, in a figurative sense, to this application mill, to which you adverted?

[Counsel for G-A]: No. He was one of the victims.

[Board Member]: Mr. Ozan was also an innocent victim --

[Counsel for G-A]: Right.

* * *

[Board Member]: Uh huh. So, when you say "an innocent victim of an application mill," you are saying that the only participant in this application mill was Mr. Ron Baptiste. Is that correct?

[Counsel for G-A]: At the time I made the statement, I might have had some thoughts in mind about the activities of -- of the initial counsel.

[Board Member]: Who would that be, Mr. Martin?

[Counsel for G-A]: It would have been Thomas Root.

Tr. of Oral Arg. at 1650-1652.

[3] *See Catoctin Broadcasting Corp. of New York*, FCC 89-74, released March 24, 1989, paras. 5-11.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-125,
Phase I

In the Matter of

Annual 1985 Access Tariff Filings

ORDER

Adopted: April 6, 1989; Released: May 4, 1989

By the Chief, Common Carrier Bureau:

1. On March 8, 1989, the Ameritech Operating Companies (Ameritech) requested that the Commission stay implementation of the refund plan required by its *February 3 Order* in the above proceeding,[1] pending Commission consideration of Ameritech's petition for reconsideration of that Order. Ameritech summarizes various arguments made in its petition for reconsideration, submitted the same date, in support of its request.

2. While denying Ameritech's previous petition for reconsideration, the *February 3 Order* did not require disbursement of the refund amounts in controversy. Rather, it required Ameritech to submit a refund plan by which it would implement such an obligation. As Ameritech submitted a refund plan simultaneously with its stay motion, it faces no outstanding Commission requirements in this proceeding which could be stayed.

3. Therefore, IT IS ORDERED that the motion for stay filed March 8, 1989, in CC Docket No. 86-125, Phase I, by the Ameritech Operating Companies IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase I, FCC 89-31, released Feb. 3, 1989 (*February 3 Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-173

In re Applications of

JAM COMMUNICATIONS, INC. File No. BPCT-870121KF

DELTA TELEVISION LIMITED File No. BPCT-870121KG

For Construction Permit
for a New Television Station
Jackson, Mississippi

MEMORANDUM OPINION AND ORDER

Adopted: April 19, 1989 **Released: May 2, 1989**

By the Review Board: MARINO (Chairman), BLUMENTHAL, [1] and ESBENSEN.

1. Before the Review Board are the *Initial Decision*, 3 FCC Rcd 6285 (released October 16, 1988) (I.D.) of Administrative Law Judge Joseph Stirmer (ALJ), and the exceptions and replies filed by both captioned applicants, JAM Communications, Inc. (JAM), and Delta Television Limited (Delta). Oral argument was held on February 24, 1989. [2]

2. Based upon our review of the I.D., the documents and transcript in the proceeding below, and the oral argument, we believe that there are substantial and material questions of fact remaining with respect to the financial qualifications of both applicants which must be resolved prior to issuance of our decision in this proceeding. Thus, we will remand this proceeding to the ALJ on the issues specified herein for the adduction of additional evidence and preparation of a Supplemental Initial Decision.

3. In the *Hearing Designation Order*, 2 FCC Rcd 3551 (released June 15, 1987) (HDO), and other than the standard comparative issue (including comparative coverage), the only issue with respect to the remaining applicants was an "air hazard" issue against JAM. This issue was resolved in its favor by *Memorandum Opinion and Order*, FCC 87M-2030, released August 28, 1987. Thus, the I.D. turned solely on comparative considerations. The ALJ ultimately determined that Delta was, in essence, a "sham," and thus entitled to no integration credit. JAM's entitlement to full 100% integration credit resulted in it being the preferred applicant. The ALJ also determined that "even if Delta received credit for 100% integration, the enhancement factors would clearly favor JAM." 3 FCC Rcd at 6291.

4. While no financial issue was specified with respect to either remaining applicant, we believe that the I.D., the record below, and the oral argument, raise substantial and material questions of fact with respect to both Delta and JAM concerning this aspect of their basic qualifications. These questions first must be resolved to determine if either applicant is basically qualified, pursuant to 47 U.S.C. §308(b), to be a Commission licensee.

5. *Delta* : A brief review of Delta's formation and organizational structure is appropriate. Delta is a limited partnership formed under the laws of Mississippi. Its general partner is Delta Television, Inc., a Delaware corporation, which holds a 20 percent interest in the partnership. The sole stockholder, director, and officer of the Delta "general partner" corporation is (now) Lesia K. Lammons. Raymond L. McGuire is the sole limited partner, owning the remaining 80 percent partnership equity (Delta Exh. 1). Sometime in the last quarter of 1987, Douglas McFadden of the law firm McFadden, Evans & Sill (Delta's counsel in this proceeding) called McGuire and informed him of an opportunity to apply for a television channel at Jackson, Mississippi (Tr. 248-249). He suggested that McGuire apply for the channel (Tr. 250). McGuire made the decision to apply approximately seven to ten days before the application was to be filed (Tr. 251), and authorized the firm to take whatever steps were needed to prepare and to file the application (Tr. 252-253).

6. Sometime between January 18-20, 1987, McGuire phoned Lammons and asked whether she would be willing to become a partner in the venture for the Jackson channel (Tr. 310, 359). Lammons and McGuire did not know each other before that telephone call (Tr. 278, 309); indeed, McGuire only became aware of Lammons through a friend, who McGuire had initially asked to become part of the application (Tr. 286-287). In an initial conversation with McGuire, Lammons agreed to become a partner (Tr. 359); however, after McGuire's first telephone conversation with Lammons, she did nothing with respect to Delta, allegedly because she was waiting to be told that McGuire had definitely decided to go forward with the application (Tr. 360-361). The next communication Lammons had concerning Delta's application was a telephone call on January 21, 1987, from Evans (Tr. 312, 360). Evans told Lammons that McGuire had decided to go forward with the application (Tr. 360-361); that the applicant would be a limited partnership (Tr. 313); and that a corporate general partner was developed for the express purpose of enabling Lammons to avoid any responsibility for any partnership debts or expenses (Tr. 314).

7. During the same conversation, Lammons adopted Evans' suggestion that another attorney in his office (Pamela Colabella, now Mrs. Pamela Cooper) be appointed secretary of the corporate "general partner" (Delta Television, Inc.) for the sole purpose of executing the application (Tr. 337-338). Evans and Colabella allegedly asked Lammons the questions that were contained in the application form, and Lammons provided answers with regard to herself (Tr. 354). The law firm purportedly had earlier posed the same questions to McGuire, but Lammons was not told what answers McGuire had provided (Tr. 269-70, 355). Colabella then signed the application as secretary of Delta Television, Inc. (Tr. 338); however, Lammons did not see the application until *after* it was filed with the Commission (Tr. 364; JAM Exh. 20).

On February 13, 1987, Colabella sent Lammons her resignation as secretary of Delta Television, Inc., "effective February 1, 1987" (JAM Exh. 19). [3]

8. With particular reference to Delta's financial representations, the ALJ found (I.D. at para. 42; emphasis added):

> Delta's Limited Partnership Agreement requires the general partner to use its best efforts to obtain financing (JAM Ex.11, p. 3). Under the date January 21, 1987, an officer of the American Fletcher National Bank in Indianapolis, Indiana wrote a letter upon which Delta is relying to establish its financial qualifications (Tr. 352; JAM Ex. 17). *The letter is addressed to Lammons' home address, but the salutation in the letter is " Dear Sir "* (Tr. 350). *Lammons has no recollection of seeing the letter before her deposition in November 1987* (Tr. 351). *Lammons claimed that she was responsible for Delta's certification that it was financially qualified, but McGuire testified at his deposition that he was responsible for providing the information (about his personal finances) which served as the basis for that certification* (Tr. 274-276). As previously noted, Lammons was told nothing of whatever information McGuire provided to the firm for the purposes of the application (Tr. 354-355). Lammons believes that the partnership will seek loans, at some point in the future, from a source not yet identified (Tr. 316, 400).

9. We note that the "bank letter" referenced above (addressed to the Delta "general partner" at Ms. Lammon's address), and submitted into evidence as JAM Exh. 17, contains only the salutation "Dear Sir" and an opening sentence; the remainder of the letter is deleted (presumably because of the prior absence of a financial issue). A further explication of the hearing colloquy with Ms. Lammon's concerning Delta's finances is additionally enlightening, and raises significant questions about its finances and financial plans for construction and operation (Tr. 314-316; emphases added):

> [JAM Counsel]: Just to be clear about that, Ms. Lammons, the purpose for your idea that the general partner would be a corporation was to see to it that you would not be liable for expenses of the company in the prosecution of the application?
>
> [Lammons]: That's correct.
>
> [Counsel]: Or for expenses of the company in the construction and operation of the station if the application was granted?
>
> [Lammons]: That's correct.
>
> [Counsel]: How much money have you so far contributed to the partnership?
>
> [Lammons]: One hundred dollars.
>
> [Counsel]: Do you understand that is the maximum you are obliged to contribute to this partnership for the purposes of the television project?
>
> [Lammons]: I don't understand your question.
>
> [Counsel]: The $100 that you have contributed, did you contribute that out of your personal resources?
>
> [Lammons]: Yes.
>
> [Counsel]: Do you understand that that sum is the maximum you are obliged to contribute out of your personal resources for this television project?
>
> [Lammons]: Yes.
>
> [Counsel]: Ms. Lammons, who is to provide the funds for the prosecution of the Delta application?.
>
> * * *
>
> [Lammons]: Mr. McGuire.
>
> [Counsel]: And if the application is granted, who is to provide the funds for the construction and operation of the station?
>
> * * *
>
> [Lammons]: *He will provide some post money, and Delta Television, Inc. will seek financial loans and whatever the -- I don' t know right now -- necessary financing to build the station.*
>
> [Counsel]: The company will seek loans, is that what you're saying?
>
> [Lammons]: *Yes.*
>
> [Counsel]: *For the purposes of the construction and operation of the station* ?
>
> [Counsel]: *Yes.*
>
> [Counsel]: *Isn' t it true that you have an agreement by Mr. McGuire to help you find those funds* ?
>
> [Lammons]: *I don' t know.*
>
> [Counsel]: Isn't it true that you have an agreement that Mr. McGuire will guarantee any loan that the partnership makes?
>
> [Lammons]: No.
>
> [Counsel]: That's not true?
>
> [Lammons]: He indicated he might be willing to, but we don't have a formal agreement.

Upon further questioning, [4] Lammons again affirmatively responded concerning these prior statements (Tr. 400):

> [Counsel]: Ms. Lammons, in your earlier testimony my notes indicate that you stated that you don't have – don't know right now how your financing is to be arranged for post- grant costs, but that the corporation will be seeking post- grant funds. You stated that earlier. Is that a correct characterization of your testimony?
>
> [Lammons]: Yes.
>
> [Counsel]: And you also testified that you provided to your attorneys the answers for the financial certification in your application during your conference call with them; is that correct?
>
> [Lammons]: That's correct.

10. In light of the foregoing, and as will be discussed *infra*, there are some significant questions raised with respect to Delta's financial qualifications. Similarly, material questions are raised with respect to this aspect of the basic qualifications of JAM.

11. *JAM* : JAM is a corporation organized under the laws of the State of Delaware. At the time JAM's application was initially filed, it was a corporation organized under the laws of the State of Mississippi. However, in June 1987, the Delaware corporation was formed, and the Mississippi corporation "merged" into the Delaware corporation. The three principals (*i. e.*, shareholders, officers and directors) of JAM remained the same with respect to both corporations. Specifically, Hilda C. Jones is JAM's president, one-third voting stockholder, and a director. John A. Peoples and Morris P. James are vice-president, and secretary/treasurer, respectively. Both Peoples and James are also directors and one-third voting shareholders (JAM Exh. 1).

12. In its exceptions, Delta focuses on the "merging" of these corporations as fatal to JAM's application because, *inter alia*, "as a non- existent entity, JAM may not be awarded a construction permit" (Delta Exceptions, at p. 4). Delta also argues (*id.*, at p. 3) that "in June of 1987, the JAM principals realized that under Mississippi corporate law they could not offer stock to non-voting shareholders, as was their plan." During the hearing proceeding below, JAM principals Jones (Tr. 149) and Peoples (Tr. 198) corroborated that contention. At oral argument, JAM's counsel, in response to a line of questioning concerning the apparent urgency of creating a corporation that could issue non-voting stock, confirmed (Tr. 427): "One of the alternatives available that might be utilized to help finance the venture is to bring in non-voting principals . . . ." Somewhat later at oral argument, JAM's counsel represented (Tr. 437): "Yes, there's a bank loan, and there are stock subscription agreements, and the record shows that the principals have been making payments on their subsription agreements, in substantial sums of money I must say." At first blush, and based upon the record evidence before us, the questions concerning JAM's financial qualifications are perhaps not as significant as those pertaining to Delta. However, given the apparent inconsistencies in JAM's plan of financing and of sources of funds for construction and operation, a further inquiry is appropriate.

13. *Discussion* : Consistent Commission policy and precedent demand that an applicant must have available sufficient net liquid assets to meet its financial commitment, and applicants must review any such documentary evidence establishing the existence of unencumbered liquid assets to assure availability of needed capital *before so certifying*. As we stated in *Las Americas Communications, Inc.*, 1 FCC Rcd 786, 788 (Rev. Bd. 1986):

> Earlier versions of Section III of Form 301 required the submission of copies of all loan agreements with banks or individuals (setting forth loan amount, interest rate, terms of repayment, and security, if any) and the submission of balance sheets or financial statements for each person or entity except financial institutions that had agreed to furnish funds, showing all liabilities and containing current and liquid assets sufficient in amount to meet current liabilities and to satisfy the proposed broadcast commitments. *E. g.*, FCC Form 301, Section III, p. 3, October 1981 ed. . . .[P]resent Form 301 continues to require written documentation to support "reasonable assurance" of funds. FCC Form 301, Section III, Instruction C, January 1982 ed. The only change is that now the documentation need not be *submitted* in the application process unless requested by the Commission. . . . The law is and remains that loan agreements and bank commitment letters must be prepared and must be sufficiently specific and complete to furnish reasonable assurance of the availability of the loans. *Jay Sadow*, 39 FCC 2d 808, 810, 26 RR 1032, 1035 (Rev. Bd. 1973).

Moreover, the instructions to FCC Form 301 are quite clear. The instructions provide a succinct definition of "net liquidity" and the documentary basis required to establish such liquidity (FCC Form 301, Instructions, Section III):

> An applicant for a new station must certify that it has sufficient net liquid assets on hand or committed sources of funds to construct the proposed facility and operate for three months, without revenue. In so certifying, the applicant is also attesting that it can and will meet all contractual requirements, if any, as to collateral, guarantees, and capital investments. As used in Section III, "net liquid assets" means the lesser amount of the net current assets shown on a party's balance sheet, with net current assets being the excess of current assets over current liabilities.

The instructions also state that although documentation supporting certification of financial qualifications "need not be submitted with this application [such documentation] must be available to the Commission upon request." *Id.* Additionally, the certifications required by Questions 1 and 2 in Section III, FCC Form 301 are specific:

1. The applicant certifies that sufficient net liquid assets are on hand or are available from committed sources to construct and operate the requested facilities for three months without revenue.

2. The applicant certifies that: (a) it has a reasonable assurance of a present firm intention for each agreement to furnish capital or purchase capital stock by parties to the application, each loan by banks, financial institutions or others, an each purchase of equipment on credit; (b) it can and will meet all contractual requirements as to collateral, guarantees, and capital investment; (c) it has determined that a reasonable assurance exists that all such sources *(excluding banks, financial institutions, and equipment manufacturers)* have sufficient net liquid assets to meet these commitments.

14. As the Board and the Commission here have observed many times, while the Commission did not require the filing of financial documentation at the time JAM and Delta filed their applications, [5] it firmly expects applicants to have such documentation at hand at the time of certification. *Public Notice on Random Verification of Financial Certifications*, 2 FCC Rcd 2122 (1987); *Dutchess Communications Corp.*, 101 FCC 2d 243 (Rev. Bd. 1985); *South Florida Broadcasting Co., Inc.*, 94 FCC 2d 452 (1983)(. . . We are not, in any way, modifying the underlying substantive criteria . . .); *Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 50 RR 2d 381, 382 (1981)(Documentation supporting the attestation of financial qualifications need not be submitted with the application but must be available to the Commission upon request). Similarly, where questions are raised as to reliance on "bank letters" (purporting to make loan proceeds available for construction and operation), the Commission has stated:

> Although the bank letters relied upon by the . . . applicants meet the reasonable assurance standard and the various banks have asserted that they were issued in good faith, *it is clear that the applicants' individual qualifications were not considered by those banks. Inquiry is needed to determine whether the bank letters were more than accommodations* and were issued consistent with normal banking practices.

Christina Communications, et al., 2 FCC Rcd 1971, 1974 (1987) (Hearing Designation Order; emphasis added) Here, substantial questions are raised with respect to Delta's sources of funds: *viz., who* reviewed *what* financial documents prior to Commission certification, Delta's financial plan, and how its "bank letter" was obtained. Similar questions are present with respect to JAM.

15. In light of the representations made in this proceeding, and under the financial issues we are specifying herein, each applicant will be required to document and/or demonstrate the following: (1) the originally-planned costs of construction and operation as formulated by both applicants before certifying and filing their respective applications; (2) their financial condition (including pertinent financial statements, clearly delineating liquid and non-liquid assets, as well as current and long-term liabilities) as of the date of certification; (3) the documents relied upon and reviewed by each individual who executed and certified the respective applications; (4) the facts and circumstances surrounding the obtaining of the "bank letters" referenced by each applicant, including the representations and documentation available to each lending institution, and as reviewed by these institutions, before issuance of these "bank letters"; (5) the letters obtained from each financial institution for each applicant; (6) the discussions held between individual principals of each applicant concerning their financial qualifications and sources of funds prior to certification.

16. ACCORDINGLY, IT IS ORDERED, That this proceeding is REMANDED to the Presiding Officer for the adduction of additional evidence and preparation of a Supplemental Initial Decision on the following issues: [6]

(1) To determine whether JAM Communications, Inc., is financially qualified to be a Commission licensee.

(2) To determine whether Delta Television Limited is financially qualified to be a Commission licensee.

17. IT IS FURTHER ORDERED, That the burdens of proceeding and proof on Issue (1) SHALL BE on JAM, and Issue (2) SHALL BE on Delta.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Delta, apparently under the misimpression that a principal in its application, is familiar with Board Member Blumenthal, and may personally owe the Board Member money, thus creating a possible bias, asks the Member's recusal. However, insofar as the Member is aware, he met the principal only once (some 15 years ago); the principal owed and owes the Board Member no money; the Member has no personal opinion of the principal and, thus, no bias toward the principal exists. Nor is the appearance of bias created by the Member's continued participation in this case. To the extent that the Member's initial oral comments recognized the name "Mickey" Mc Guire from when he was "much younger", the Member's reference there was to the well-known child star who regularly appeared on the "Old Time Movie" segment of television's Howdy Doody Show in the 1950's, and not to the Delta principal, to whom he was passingly introduced some 15 years ago. The record further shows that the Member did not realize that the Delta principal, Raymond L. McGuire, was also known as "Mickey" McGuire until later in the argument. We trust that this relieves Delta's obvious misimpression,and its motion for recusal is, accordingly, denied.

[2] Following oral argument, further action by the Board was held in abeyance for an additional 3 weeks to afford the parties time to attempt a settlement agreement (Tr. 459-461). No settlement has been reached.

[3] Additionally, Delta's Limited Partnership Agreement was not signed by Lammons (JAM Ex. 11). Instead, Colabella signed the agreement on January 21, 1987, as the secretary of Delta Television, Inc. (JAM Ex. 11, p. 7). Collabella was "Secretary" of Delta for approximately eleven days.

[4] This line of questioning was conducted by counsel for another applicant, whose application was dismissed prior to the filing of exceptions with the Board.

[5] The Commission has issued a news release indicating that it is revising FCC Form 301 "to strengthen its financial certification requirements by requiring additional information from applicants" by *Report and Order* (FCC 89-110, March 30, 1989). Indeed, a Commission ALJ recently opined, in *Memorandum Opinion and Order,* FCC 89M-1126, released April 10, 1989 (at n. 3), that "[t]he switch to the financial certification procedure, a procedure that encourages people to lie, has not only been a disaster, it has placed an undue burden on the Commission's adjudicating resources." With all due respect to the ALJ, the Commission has never "encouraged" applicants to "lie." False certification of a Commission application form can lead to criminal prosecution pursuant to 18 U.S.C.§1001.

[6] If the documents/proposed exhibits exchanged prior to hearing, and/or the hearing testimony so warrant, the Presiding Officer should, on his own motion, further enlarge the issues to include false certification/misrepresentation issues, as appropriate.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-435

In the Matter of

Amendment of Section 73.202(b), RM-6411
Table of Allotments,
FM Broadcast Stations.
(Brookfield, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 11, 1989; Released: April 24, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 5578 (1988), issued in response to a petition filed by Dwight Carver (petitioner), proposing the substitution of FM Channel 245C2 for Channel 249A at Brookfield, Missouri, and modification of his license for Station KZBK, to specify the higher class channel. Petitioner filed supporting comments in which he reaffirmed his interest in the channel.[1]

2. We believe the public interest would be served by the substitution of Channel 245C2 for Channel 249A at Brookfield, Missouri, since it could provide the community with its first wide coverage area FM Station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at the current site of Station KZBK.[2] In addition, we have authorized a modification of the petitioner's license for Station KZBK, Brookfield, Missouri, to specify operation on Channel 245C2 in accordance with Section 1.420(g) of the Commission's Rules since no other expressions of interest have been received.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 9, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Brookfield, Missouri	245C2

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KZBK, Brookfield, Missouri, IS MODIFIED to specify operation on Channel 245C2 in lieu of Channel 249A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] SCS Broadcasting submitted a counterproposal that is not considered herein as it was untimely filed. As stated in paragraph 3 of the appendix to the *Notice*, counterproposals must be advanced by the initial comments deadline. Such proposals will not be considered if first submitted in reply comments.

[2] The coordinates for Channel 245C2 at Brookfield are 39-50-26 and 93-04-51.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-468

In the Matter of

Amendment of Section 73.202(b),	RM-6009
Table of Allotments,	RM-6229
FM Broadcast Stations.	
(Easton and Delmar,[1]	
Maryland)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 11, 1989; Released: April 24, 1989

By the Chief, Allocations Branch:

1. The Commission has under consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 6662 (1987), proposing the substitution of FM Channel 244B1 for Channel 244A at Easton, Maryland. The *Notice* was issued in response to a petition filed by Clark Broadcasting Company (Clark). Clark also requested modification of its license for Station WCEI-FM to specify operation on Channel 244B1. Apex Associates, Inc. (Apex) filed a counterproposal.[2] Clark and Apex filed comments and replies. [3] Apex Associates, Inc. withdrew its counterproposal on January 25, 1989.

2. In view of the fact that Apex Associates, Inc. has withdrawn its request for allotment of Channel 243A at Delmar, Maryland, no further analysis or a comparative study is necessary.

3. Based on the above information, we believe the public interest would be served by the substitution of Channel 244B1 for Channel 243A at Easton, Maryland, and modification of the license for Station WCEI-FM to specify operation on Channel 244B1. Channel 244B1 can be allotted to Easton at the current site of Station WCEI-FM in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules.[4] We have authorized modification of the license for Station WCEI-FM to specify operation on Channel 244B1 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 9, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Easton, Maryland	244B1

5. IT IS FURTHER ORDERED, That the counterproposal filed by Apex Associates, Inc. to add Channel 243A to Delmar, Maryland, IS DISMISSED (RM-6229).

6. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WCEI-FM, Easton, Maryland, IS MODIFIED to specify operation on Channel 244B1, in lieu of Channel 244A subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Delmar has been added to the caption.

[2] Public Notice of the counterproposal was given on January 15, 1988, Report No. 1707 (RM-6229).

[3] Several documents were late filed in this proceeding. Perdue, Incorporated filed comments. Apex filed a motion for leave to file supplemental comments and supplemental comments. Clark filed opposition comments and a Apex filed a reply to the opposition. These filings furnished information no longer relevant in light of the withdrawal of the Apex Counterproposal.

[4] The coordinates for Channel 244B1 are 38-46-13 and 76-04-55.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-90

In the Matter of

Amendment of Section 73.202(b), RM-6679
Table of Allotments,
FM Broadcast Stations.
(Kosciusko, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 11, 1989; Released: April 24, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by G. Michael Comfort (petitioner), requesting the allotment of FM Channel 271A to Kosciusko, Mississippi, as that community's second FM broadcast service. Petitioner submitted information in support of the proposal and stated his intention to file an application for the channel.

2. We believe petitioner's proposal warrants consideration. Channel 271A can be allotted to Kosciusko, Mississippi, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 10.3 kilometers (6.4 miles) northwest of the community.[1] The site restriction will prevent a conflict with Station WWSL, Channel 272A, Philadelphia, Mississippi.

3. In view of the fact that the proposed allotment could provide a second broadcast service to Kosciusko, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Kosciusko, Mississippi	286C1	271A, 286C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 16, 1989,** and reply comments on or before **July 3, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

G. Michael Comfort
711 Thorngrove Cove
Columbus, Mississippi
39701

Larry G. Fuss
Contemporary
Communications
P.O. Box 4010
Opelika, Alabama 36803
(Consultant to the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 271A are 33-06-42 and 89-40-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-331

In the Matter of

Amendment of Section 73.202(b), RM-6356
Table of Allotments,
FM Broadcast Stations.
(Duluth, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 11, 1989; Released: April 24, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 4305 (1988), issued in response to a petition filed by Minnesota Public Radio (petitioner), requesting the allotment of FM Channel *247C2 to Duluth, Minnesota, and its reservation for noncommercial educational use. Petitioner filed comments in support of the *Notice* and restated its intention to apply for the channel. The University of Minnesota and the Association of Minnesota Public Educational Radio Stations filed opposition comments.[1] Petitioner filed reply comments. On October 19, 1988, the University of Minnesota withdrew its comments.

2. The Association of Minnesota Public Educational Radio Stations (AMPERS), opposes the allotment and reservation of Channel 247C2 in Duluth. According to AMPERS, the Duluth market is well served by three public noncommercial radio stations, one located in Duluth, and two other stations, one in Grand Rapids, Minnesota, and one in Haywood, Wisconsin, whose signals cover at least 50 percent of the population in Duluth. AMPERS argues that the resources and community support in the area are not limitless and an additional noncommercial channel could cause economic hardships to existing facilities. AMPERS asserts that the Duluth market does not need another Twin Cities repeater station and if there is to be a new station in Duluth, it should be one which will provide locally produced programming responsive to the needs of the community.

3. The University of Minnesota (University), licensee of Radio Station KUMD-FM, Duluth, expressed doubt as to the need for an additional noncommercial educational station in Duluth and questioned how the proposed action would benefit the public interest in the Duluth area. According to University, petitioner's proposed new service will be a repeater of Station KSJN-FM in the Twin Cities and would provide programming duplicative of that already available on at least one of the three principal non-commercial stations in the Duluth market. University argues that it would be most desirable for an additional service to be provided by an entity which currently has no outlet in the market or at least by an entity which will provide local programming in the area of news and public affairs. If its arguments are rejected, the University of Minnesota states it will seriously consider filing an application for Channel *247C2 at Duluth and construct the station.

4. Petitioner, in reply comments, states that it operates a regional noncommercial educational FM service, serving Minnesota, portions of Wisconsin, Iowa, North Dakota and South Dakota. Petitioner states that it offers two basic types of service and is committed to extending both services to as many listeners within the region as possible. The first is a mix of classical music and informational programming, and the second is news and information programming with very little musical content. Petitioner is the licensee of non-commercial educational FM Station WSCD(FM), Duluth, which carries the musical format. Petitioner desires to extend its news format to the Duluth area but cannot construct another noncommercial educational station on a reserved frequency because none are available due to protection requirements to other FM Stations and TV Channel 6 Station KBJR-TV. According to petitioner, the arguments raised against the requested allotment are premature, as allegations of economic impact should be made at the application stage, where the issues can be more fully developed, rather than at the rule making stage. Petitioner further argues that arguments raised about whether petitioner should be selected as the permittee of the new channel are also premature, as this is a question which should be raised at the time that the applications for the construction permit is considered by the Commission. Petitioner maintains that in allotting new channels, the Commission primarily looks to whether the proposal meets the mileage separation requirements and whether there has been an expression of interest in constructing a station on the requested channel. Petitioner asserts that it has shown that Channel *247C2 does meet the spacing requirements and two expressions of interest have been filed for the channel. Therefore, petitioner requests that Channel *247C2 be allotted to Duluth and reserved for noncommercial educational use.

5. Channel *247C2 can be allotted to Duluth in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] As stated in the *Notice*, the Commission does not normally reserve commercial channels for noncommercial educational use. However, exceptions have been made in cases where the channels in the noncommercial educational band are not available because of foreign allotments (Canadian or Mexican) or potential interference to operation on VHF Television Channel 6. Here, potential interference to Station KBJR-RV, Channel 6, Duluth, Minnesota, justifies the reservation on a commercial channel for noncommercial educational use. In response to concerns about the type of programming intended by the petitioner, we do not believe it is appropriate in the rule making process to question the programming intentions of the party seeking an allotment. In addition, allegations of economic impact are more appropriate, if at all, at the application stage, where the issues can be more fully developed. It should be noted that no interest was expressed in allotting the channel for commercial use rather than reserving the channel for noncommercial educational use.

6. Concurrence by the Canadian government has been obtained since Duluth is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

7. We believe the public interest would be served by allotting Channel *247C2 to Duluth, since an interest has been expressed in providing the community with an additional noncommercial educational service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 9, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Duluth, Minnesota	225C1, 235C, 239C1, *247C2, 255C1, 269A, 277C1, 286C1

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Northern Community Radio, Inc. filed late comments. Dick Brooks, General Manager of Station WOJB-FM, Haywood, Wisconsin, also filed comments. These comments, although timely filed, have not been accepted as they were not accompanied by a certificate of service as required by Section 1.420(a),(b) and (c) of the Commission's Rules.

[2] The coordinates for Channel *247C2 at Duluth are 46-47-00 and 92-06-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-91

In the Matter of

Amendment of Section 73.606(b), RM-6659
Table of Allotments,
TV Broadcast Stations.
(Billings and Lewistown, Montana)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 10, 1989; Released: April 24, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Comanche Enterprises (petitioner) seeking the allotment of television Channel 13 to Billings, Montana. Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel.

2. Billings (population 66,798),[1] seat of Yellowstone County (population 108,035), is located in south central Montana. Lewistown (population 7,104), seat of Fergus County (population 13,076), is located in central Montana, approximately 160 kilometers (100 miles) northwest of Billings. Channel 13 can be allotted to Billings in conformity with the minimum distance separation requirements of the Commission's Rules provided Channel 13 is deleted from Lewistown, Montana.[2] It would also be necessary to impose a site restriction on Channel 13 (vacant), Glendive, Montana, 58.4 kilometers (36.3 miles) northwest of the community.[3] Canadian concurrence will be obtained for the allotment of Channel 13 at Billings, since the community is within 320 kilometers of the U.S.-Canadian border.

3. In support of its request, petitioner states that Channel 13 was assigned to Lewistown thirty-six years ago in the first Television Table of Assignments, and has not been used as a full service television station. According to petitioner, Channel 13 is currently used for secondary translator operation to rebroadcast the signal of a full service station in Billings. Petitioner states that if a site restriction is placed on vacant Channel 13 at Glendive, Montana, the new Billings station could be constructed at the local antenna farm where the other Billings FM and TV towers are already located. Petitioner comments that the population growth of Billings has produced a rise in demand for media information and entertainment and that the reassignment of Channel 13 from Lewistown to Billings will result in a more beneficial allotment of a scarce VHF channel.

4. We believe the public interest would be served by proposing the allotment of Channel 13 at Billings since it could provide the community with additional television service. In view of the above, the Commission considers it appropriate to seek comments on the proposal to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Billings, Montana	2, 6, 8, *11, 14, 20+	2, 6, 8, *11, 13, 14, 20+
Lewistown, Montana	13	—

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 16, 1989,** and reply comments on or before **July 3, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard J. Fox
Comanche Enterprises
2024 Monad Road
Billings, Montana 59102

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The population figures are from the 1980 U.S. Census.

[2] The coordinates for Channel 13 at Billings are 45-46-48 and 108-30-18.

[3] The coordinates for Channel 13 at Glendive are 47-26-32 and 105-18-21.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-110

In the Matter of

Amendment of Section 73.202(b),	RM-6134
Table of Allotments,	RM-6381
FM Broadcast Stations.	
(Los Ybanez and Denver City, Texas)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 11, 1989; Released: April 24, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 1635 (1988), proposing the allotment of Channel 300C2 to Los Ybanez, Texas, as a first local FM service, at the request of Israel Ybanez (petitioner). Petitioner filed supporting comments[2] reaffirming his interest in applying for the channel, if allotted. Gayle C. Atchley (Atchley), permittee of Station KDNC(FM), Channel 296A, Denver City, Texas, filed a counterproposal suggesting the substitution of Channel 299C2 for Channel 296A and the modification of the station's permit accordingly. [3] The counterproposal is mutually exclusive to the Los Ybanez proposal since the communities are separated by less than the required minimum distance separation of 130 kilometers (81 miles) for adjacent Class C2 to C2 allotments. Petitioner and Atchley filed reply comments.[4] Additional documents were filed.[5]

2. As stated in the *Notice*, based on the information submitted by the petitioner, we could not determine the community status of Los Ybanez for allotment purposes. We requested the petitioner to demonstrate in his comments, that Los Ybanez has social, economic or cultural indicia to qualify it as a "community" for allotment purposes. Although Los Ybanez is an incorporated area, the fact that the location lacked official coordinates lead us to question its community status.

3. In response to the *Notice*, petitioner submits information in support of his proposal, namely a 7.5 minute map depicting the boundaries of Los Ybanez and calculated coordinates for the area, using the City Hall as his reference point. Petitioner asserts that Los Ybanez has a Mayor, five (5) Aldermen, a City Secretary and Chief of Police, a church and a package store. Petitioner also submitted evidence of incorporation.

4. In reply comments, petitioner suggests the allotment of Channel 248C2 and Channel 290C2 to Denver City to resolve the conflict with the mutually exclusive proposal at Denver City.

DISCUSSION

5. Our engineering analysis confirms that Channel 248C2 and Channel 290C2 are available for consideration at Denver City. Thus, on the basis of the availability of other channels for consideration at Denver City we find no major obstacle prohibiting the allotment of Channel 300C2 at Los Ybanez. We believe the petitioner has sufficiently demonstrated the community status of Los Ybanez. In view of the fact that there are no official coordinates for Los Ybanez, we shall designate the coordinates for the City Hall of Los Ybanez as the reference coordinates. *See* Section 73.208(a)(1) of the Commission's Rules. Our engineering analysis estimate the coordinates for the City Hall are 32-43-04 and 101-54-33.

6. After careful consideration of the information presented in this proceeding, we conclude that it is in the public interest to allot a first local FM service to Los Ybanez, Texas, and to upgrade the existing channel at Denver City, as that community's first wide coverage area service. Both communities can receive allotments in compliance with the Commission's minimum distance separation requirements. Channel 300C2 can be allotted to Los Ybanez with a site restriction of 5.8 kilometers (3.6 miles) west of the city in order to avoid a short spacing to Station KEYJ-FM, Channel 300C1 at Abilene, Texas.[6] Although both Channel 248C2 and Channel 290C2 are available at Denver City, we have determined that Channel 248C2 should be substituted for Channel 296A. Channel 248C2 can be allotted to Denver City at the site specified in the construction permit for Station KDNC(FM).[7]

7. Since the community of Los Ybanez is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence of the Mexican government has been obtained for the proposal.

8. As requested, we are herein modifying the construction permit of Station KDNC(FM) to specify operation on Channel 248C2 in lieu of Channel 296A, since Channel 290C2 is also available at Denver City, as an equivalent channel.[8] *See Modification of FM and TV Stations Licenses*, 98 FCC 2d 296 (1984).

9. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 9, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Denver City, Texas	248C2
Los Ybanez, Texas	300C2

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit of Gayle C. Atchley for Station KDNC(FM), IS MODIFIED, to specify operation on Channel 248C2 in lieu of Channel 296A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

11. The window period for filing applications for Channel 300C2 at Los Ybanez, Texas, will open on **June 12, 1989,** and close on **July 12, 1989.**

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Denver City, Texas, has been added to the caption.

[2] Informal supporting comments were filed by the City of Los Ybanez, Texas and Sammy L. Owen. Both parties neglected to indicate service on the petitioner or to file a sufficient number of copies. *See* Section 1.420 of the Commission's Rules. No consideration will be given to the comments.

[3] Public Notice of the counterproposal was given on May 20, 1988, Report No. 1729.

[4] Atchley requested a one day extension of time to file reply comments. Petitioner filed an opposition. We find the extension request unnecessary, since the counterproposal public notice automatically extended the time to respond thereto 15 days after its release. Therefore, consideration will be given to the reply comments. *See Corinth, Hadley and Queensbury, New York,* 52 FR 21955, June 10, 1987. In addition, Atchley filed a supplement to reply comments responding to reply comments. The supplement will not be accepted as it is an unauthorized pleading. *See* Section 1.415(d).

[5] P&G Communications (P&G), filed a petition for reconsideration of a staff action by letter returning its petition for rule making to allot Channel 300C2 to Plains, Texas. P&G seeks acceptance of its proposal in the context of this proceeding. Atchley filed a request for leave to file an opposition thereto. P&G's petition was initially received by the Office of the Secretary one day after the established comment period in this proceeding. Thus, since it violated Section 1.420(d) of the Commission's Rules it was not considered. P&G alleges the petition was timely delivered by Federal Express to the Office of the Secretary on the comment date. We shall assume, without reaching the question, that proof that a federal express package from P&G was received at the Commission on the comment date in this proceeding constitutes sufficient proof that the counterproposal in fact was received. However, we note the fact that P&G attempted to advance its proposal to correspond with the cut-off date in this proceeding and was obligated to adhere to the requirements set forth in the *Notice*. Although the Plains proposal is mutually exclusive with the Los Ybanez and Denver City proposals, P&G failed to serve copies of its petition on parties in this proceeding, as required by the *Notice*, paragraph 4 of the Appendix to the *Notice*, and Section 1.420 of the Commission's Rules. In addition, P&G's petition for reconsideration was not served on the parties. In addition, P&G's original petition and its petition for reconsideration were signed by its consultant, and were not signed or verified by a principal. Therefore, we find that the petition for reconsideration as well as the counterproposal violate our rules and, accordingly, warrants no further consideration herein.

[6] The restricted site coordinates are 32-43-45 and 101-58-09.

[7] The coordinates are 33-01-53 and 102-48-47.

[8] Since we have not received any other expressions of interest in an allotment at Denver City, we shall not allot Channel 290C2 at Denver City.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRAC COMMUNICATIONS, INC.,
Complainant,

v. File No. E-88-77

DETROIT CELLULAR
TELEPHONE COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: April 14, 1989; Released: April 24, 1989

By the Chief, Common Carrier Bureau:

1. On May 31, 1988, the United States District Court for the Eastern District of Michigan (the court) entered an order which referred certain issues before it to the Commission under the doctrine of primary jurisdiction.[1] On June 21, 1988, TRAC Communications, Inc. (TRAC) filed the captioned formal complaint against Detroit Cellular Telephone Company (DCTC), seeking resolution of the issues referred to the Commission by the court.[2] For the reasons discussed below, we grant TRAC's request for a ruling that certain contractual provisions imposed on it by DCTC violated sections 201(b) and 202(a) of the Communications Act [3] and Commission policies requiring that cellular licensees permit unrestricted resale of their underlying services.

I. BACKGROUND

2. In 1981, the Commission amended its rules to authorize commercial cellular communications.[4] It provided a frequency assignment plan that would allow for two competing facilities-based cellular systems in any particular metropolitan area or geographic market[5] and reserved one block of spectrum for the exclusive use of the wireline carrier(s) certified to serve the area.[6] Because it continued to believe that restriction of resale was contrary to the public interest, it said that all radio licenses awarded to cellular system operators would be conditioned so that "no restrictions on resale and shared use of cellular services [would] be permitted" (footnote omitted),[7] thereby "promoting a significant second tier of cellular service competition at the retail level . . . ."[8]

3. Detroit SMSA Limited Partnership (hereinafter Ameritech) of which Ameritech Information Technologies is the general partner, is the licensee for Block B (*i.e.*, the wireline) carrier cellular system in the Detroit, Michigan market. The record reflects that Ameritech began providing commercial cellular service in that market in late September of 1984.[9]

4. DCTC, a Michigan general partnership, is the Block A (*i.e.*, non-wireline) licensee providing cellular service in the Detroit market under the name "Cellular One". From September 1984 until at least July 1985, when its own system became operational, DCTC resold cellular service it had obtained from Ameritech.

5. TRAC, a Michigan corporation, is a non-facilities-based provider of cellular service in the Detroit market and operates as a reseller under the name "Cellnet". From September 1984 until July 1985, it resold only DCTC's service, making TRAC, in effect, a reseller of a reseller's service during that period. TRAC's provision of cellular service at that time was the subject of a contractual arrangement with DCTC which it entered into on October 30, 1984 and terminated two years later (the 1984 Agreement).

6. Paragraph 14 of the 1984 Agreement contained an exclusivity provision that TRAC's instant complaint challenges, *i.e.* :

> [TRAC] shall neither purchase, nor solicit, promote, offer, or take orders or requests for, any Cellular Radio Telephone Service other than [DCTC's] Service. DCTC shall have the right to market [its] Service, directly or indirectly, to the public, to appoint sales representatives to offer and take requests for [its] Service and obtain subscribers thereto and to enter into other resale or wholesale agreements with respect to [its] Service."[10]

The 1984 Agreement was terminated, effective October 30, 1986, after TRAC, on August 1, 1986, gave written 60 days' notice of its intent to terminate the agreement.[11] Contemporaneous with the expiration of the 1984 Agreement, TRAC entered into a non-exclusive agreement with Ameritech for TRAC to resell Ameritech's cellular services in the Detroit market. TRAC and DCTC thereafter entered into a new agreement on March 26, 1987, retroactive to September of 1986, which did not contain the exclusivity provision here in issue. In sum, TRAC has been reselling both Ameritech and DCTC service since October of 1986.[12]

7. The issues referred by the court arise out of paragraph 14 of the parties' 1984 Agreement. The court seeks the Commission's views on:

> 1. Whether the provision in paragraph 14 of an agreement for the resale of Defendant's non-wireline cellular radio service, which agreement Plaintiff terminated in September 1986, and which provision provides that the Plaintiff "shall neither purchase, nor solicit, promote, offer, or take orders or requests for any Cellular Radio Telephone Service other than the Service [provided by Defendant]" is unjust or unreasonable under Section 201(b) of the Communications Act of 1934, as amended, or is an unjust or unreasonable discrimination under Section 202(a) of that act;
>
> 2. Whether the contract provision described in issue (1) above is contrary to the FCC's policies concerning the provision and resale of cellular radio service.[13]

II. CONTENTIONS OF THE PARTIES

A. *TRAC's Complaint*

8. In its complaint, TRAC contends, *inter alia*, that the technical services of DCTC and Ameritech are not totally fungible because of differences in geographic coverage of their respective systems.[14] According to TRAC, so long as it was contractually barred from reselling the Ameritech cellular service, it was effectively foreclosed from competing for the business of those potential subscribers whose cellular telephone requirements would have been better fulfilled through the Ameritech system.[15] TRAC contends that such potential subscribers:

> thus represented lost business as to TRAC, even though DCTC -- which also could not realistically compete for their business -- realized no direct benefit from its contractual foreclosure of TRAC...[16]

According to TRAC, the exclusivity provision not only did not increase subscribership to DCTC's system, but it depressed subscriber growth on the Ameritech system, and denied potential TRAC customers a choice of underlying cellular carriers.[17]

B. *DCTC's Answer*

9. DCTC justifies the 1984 Agreement on a variety of grounds alleging, *inter alia*, that: "TRAC was not foreclosed from *any* potential market of subscribers . . . ";[18] there is no overriding public interest in preventing the kind of private contractual arrangement here involved;[19] the agreement was consistent with the federal antitrust laws;[20] and the exclusivity provision had the procompetitive effect of increasing inter-block competition and caused no decrease in intra-block competition.[21]

10. DCTC argues that "[s]ince DCTC was a reseller of Ameritech at the time of the 1984 Agreement, there were *no* differencs (sic) in coverage . . . ." of their respective operations.[22] DCTC further contends, in sum, that the exclusivity provision in the 1984 Agreement did not violate section 201(b) or section 202(a) of the Communications Act, neither offended the Commission's cellular resale policy nor foreclosed competition in the provision of cellular service in the Detroit market, but was just and reasonable given the circumstances at the time.[23] DCTC notes that the agreement was for a one-year period and renewable automatically on its anniversary date unless TRAC gave 60 days' written notice of its intent to terminate the agreement. Thus, in DCTC's view, the duration of the 1984 Agreement was solely at TRAC's election and TRAC elected to continue the agreement for two years. DCTC alleges that "[t]he only effect of the exclusivity provision was to assure that DCTC service would be used . . . ."[24] In DCTC's view, the provision minimized alleged conflicts of interest arising from a resellers' reliance on two services, and furthered the Commission's goals by promoting a level playing field between DCTC and Ameritech in the Detroit area during Ameritech's "headstart" period.[25] During the period that it operated as a reseller of Ameritech, DCTC contends that the exclusivity provision harmed neither interbrand competition (*i.e.*, between Ameritech and itself) nor intrabrand competition because, given free entry of resellers, it had no market power.[26]

C. *TRAC's Reply*

11. In response to DCTC's assertion that TRAC's complaint failed to address the first referral issue, TRAC notes that it had referred to and quoted from the Commission's seminal 1976 *Resale* decision[27] in setting forth the history of its "unrestricted resale" policies. TRAC argues that " . . . violation of a Commission Rule or policy constitutes a violation of the section of the Communications Act which underlies such rule or policy . . . ."[28] TRAC reiterates that the cellular services of Ameritech and DCTC were not totally fungible because of differences in the geographic areas their systems covered for at least part of the relevant period. TRAC also reasserts that the effect of the exclusivity provision was to prevent it from offering its customers a choice of cellular systems so that the customer could select that system whose service best met his requirements.

12. Furthermore, TRAC reiterates its position that the exclusivity provision was discriminatory in violation of section 202(a), stating:

> unlike TRAC, DCTC itself was free to continue to resell Ameritech's service even after DCTC implemented its own cellular system. Thus, whether or not DCTC's resale agreements with other independent resellers in the 1984-1986 period contained an exclusivity provision, its imposition of a restriction upon TRAC, to which its own retail arm was not subject, was discriminatory.[29]

13. TRAC further avers that the exclusivity provision preventing it from reselling the competing system's service cannot be reconciled with the Commission's resale policy[30] and unreasonably "made TRAC wholly dependent upon DCTC for its very existence."[31] TRAC takes vigorous exception to DCTC's claim that the exclusivity provision of the 1984 Agreement was procompetitive.[32] When DCTC's system was completed and its customers (including those of TRAC) were moved from the Ameritech system to the DCTC system, those who preferred to remain on the Ameritech system were unable to do so while remaining TRAC customers. As a result, TRAC states that it lost a number of customers at that time it could have continued to serve if it had been able to resell Ameritech service.[33]

III. DISCUSSION

14. The Commission has generally addressed issues at bar in this proceeding in several contexts on prior occasions. In 1976, the Commission prescribed unlimited resale of all domestic private line carrier services after finding that tariff restrictions preventing or restricting resale of such services were "unjust and unreasonable" in violation of section 201(b) of the Act and "unlawfully discriminatory" under section 202(a) of the Act.[34] In 1980, the Commission prescribed unlimited resale for all domestic common carrier services including MTS and WATS switched voice services.[35] The Commission directed all carriers subject to its jurisdiction to eliminate "all restrictions on the resale" of their domestic public switched network services[36] just as it had previously directed them to eliminate all restrictions on their private line services. In 1981, when the Commission amended its rules to provide for the authorization of cellular commu-

nication systems on a commercial basis, it expressly reaffirmed its previous decisions mandating unrestricted resale of carrier services. It stated that:

> restriction of cellular resale is contrary to the public interest for reasons similar to those set forth in *[Resale of Switched Services]*. Therefore, pursuant to our licensing authority set forth in Section 309 of the Communications Act we will condition radio licenses awarded to system operators such that no restrictions on resale and shared use of cellular services will be permitted. (footnotes omitted)[37]

15. Recently, in *Cellular Telephone*, *supra*, the Commission affirmed our ruling that Cellular Telephone Company (CTC), the nonwireline licensee in the New York City market, was required under the Commission's current resale policy to offer resale capacity to NYNEX Mobile Communications Company (NYNEX-R), a resale affiliate of New York SMSA Limited Partnership (NYSLP), the wireline licensee in that market.[38]

16. Thus, over a long period of time, Commission policy and orders have clearly prohibited a cellular licensee of the Commission from restricting resale of cellular services furnished over the licensed facilities. For the time period after DCTC commenced its own operations, the Commission's resale policy was indisputably applicable since geographic coverages of the primary service providers was divergent. It is clear that common carriers are required to indifferently hold themselves out to provide substantially the same services on substantially the same terms and conditions to any and all similarly situated persons or entities on a nondiscriminatory basis.[39] Thus, any contract provision that contravened such common carrier obligations would be against public policy unless justified. The exclusivity provision here in issue impeded TRAC from reselling Ameritech's cellular service and impaired TRAC's ability to promptly provide service that was available over Ameritech's system but might not be available from DCTC or available only after unsatisfactory administrative or other delays. The Commission has ordered both the wireline and nonwireline carriers to eliminate all restrictions on resale of carrier services and has prescribed unlimited resale of cellular services, after finding any restriction on resale contrary to the public interest and unlawful under section 201(b) and section 202(a) of the Act.[40] DCTC has not shown that it was exempt from such Commission directives.[41] Here, DCTC prohibited resale of its service by TRAC unless TRAC agreed not to resell the service of others including DCTC's wireline competitor, Ameritech. In *CellularTelephone*, the Commission upheld our finding that a nonwireline cellular licensee could not lawfully bar resale of its service by an affiliate of its wireline competitor in the New York City market. DCTC has made no persuasive showing that it should have been allowed to bar resale of its service if the reseller wished to also resell service of DCTC's wireline competitor in the Detroit market. Accordingly, the exclusivity provision here in issue contravened Commission policy and had an anticompetitive effect insofar as it restricted resale of cellular services furnished over DCTC's licensed cellular facilities from July 1985 until October 30, 1986, when DCTC finally allowed TRAC to resell both DCTC and Ameritech's services. For the period from September 1984 to July 1985, however, we are unable to find any anticompetitive effect from the terms of the 1984 Agreement in question because TRAC could have dealt directly with Ameritech under the Commission's resale policies rather than operate through a reseller.

17. When the Commission has specifically addressed restrictions on resale, it has focused on primary service providers. It is clear from the record in this proceeding that TRAC was disadvantaged by its inability to sign up customers desiring to utilize facilities of both underlying systems. Therefore, we cannot grant DCTC's Petition seeking a Declaratory Ruling that the exclusivity provision, about which TRAC complains, did not offend the Communications Act or Commission policy.

IV. CONCLUSION

18. We conclude that the exclusivity provision here challenged was unjust and unreasonable under section 201(b) of the Act and unreasonably discriminatory under section 202(a) of the Act and contravened Commission policies concerning the provision and resale of cellular radio services.

V. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201, 202, 208 and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 202, 208, 309, and authority delegated in section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Formal Complaint filed by TRAC Communications, Inc. on May 31, 1988, IS GRANTED to the extent indicated herein and otherwise IS DENIED.

20. IT IS FURTHER ORDERED that the Petition For Declaratory Ruling of Detroit Cellular Telephone Company filed on June 30, 1988, IS DENIED to the extent stated herein.

21. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order be mailed forthwith to the Honorable Julian Abele Cook, Jr., Judge, United States District Court for the Eastern District of Michigan.

22. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] TRAC Communications, Inc. v. Detroit Cellular Telephone Co., No. 87-CV73787DT (E.D. Mich. May 31, 1988) (Referral Order).

[2] Also before us are an Answer to the formal complaint, filed by DCTC on July 25, 1988, and a Reply filed by TRAC on August 9, 1988. A petition for declaratory ruling, addressing substantive issues that are subsumed within the subject complaint, was filed by DCTC on June 30, 1988, File No. ENF-88-14 (Petition), and was consolidated into this proceeding on August 12, 1988. Order, 3 FCC Rcd 4864 (1988). On October 28, 1988, TRAC filed a "Supplement to Formal Complaint", inviting

attention to the Commission's order in Cellular Telephone Co., 3 FCC Rcd 6274 (1988) (*Cellular Telephone*). While such pleading contained an additional argument and was not accompanied by a motion for leave to file unauthorized pleading as required by section 1.45(c) of the rules, parties are responsible under section 1.720(g) of the rules for updating relevant supporting legal authorities. Amendment of Rules Governing Procedures to be Followed Where Formal Complaints Are Filed Against Common Carriers, 3 FCC Rcd 1806 (1988). In the interest of ensuring that relevant legal authorities are timely updated, we have accepted TRAC's additional pleading which is unopposed.

[3] 47 U.S.C. § 201(b) provides, in pertinent part, that any charge, practice, classification, or regulation for and in connection with interstate or foreign communication that is unjust or unreasonable is unlawful. Under 47 U.S.C. § 202(a), it is also unlawful:

> for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

[4] Cellular Communications Systems, 86 FCC 2d 469 (1981), *modified*, 89 FCC 2d 58 (1982), *further modified*, 90 FCC 2d 571 (1982), *petition for review dismissed sub nom.* United States v. FCC, No. 82-1526 (D.C. Cir. Mar. 3, 1983) (*Cellular Resale*).

[5] *Id.* at 482.

[6] *Id.* at 483, 490 n.56. The other block was reserved for use of nonwireline carriers.

[7] *Id.* at 511.

[8] Statement of Commissioner Fogarty, *id.* at 642.

[9] *See* Answer of DCTC at 7 n.10.

[10] Detroit Cellular Telephone Company Reseller Agreement (copy attached to complaint and to Petition). It appears that rates for cellular service in the Detroit market were not regulated during the relevant period. *See* Petition at 22, Affidavit of Jerry A. Hausman, 6 n.2, and Reply at 15.

[11] *See* Petition, Affidavit of Theresa Fenelon at Exhibit D.

[12] All of TRAC's resale customers received service over the underlying cellular facilities of Ameritech prior to July 1985 when DCTC's own licensed cellular facilities became operational. Therefore, to the extent that TRAC customers wished to continue receiving service over Ameritech's system, if TRAC could satisfy that need, DCTC stood to lose revenues if and when it substituted its own facilities for those of Ameritech in providing service to TRAC and indirectly to those customers.

[13] Referral Order at 2-3.

[14] Complaint at 4, Exhibit B to complaint at 2.

[15] Complaint at 4.

[16] *Id.* at 4-5.

[17] *Id.* at 5.

[18] Answer at 13.

[19] Petition at 13, 27.

[20] *Id.* at 14 n.17.

[21] *Id.*, Affidavit of Jerry A. Hausman at 9-13.

[22] Answer at 5.

[23] *Id.* at 7. DCTC contends that TRAC's complaint ignores the first issue referred by the court, *i.e.*, whether the exclusivity provision violated sections 201(b) and 202(a) of the Act.

[24] *Id.* at 8, *citing* DCTC's Petition at 19.

[25] *Id.* at 9-10.

[26] Answer at 9.

[27] Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261 (1976), *modified*, 62 FCC 2d 588 (1977), *aff'd sub nom.* AT&T v. FCC, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978) (*Resale*). The Commission there found that tariff restrictions preventing or restricting resale and sharing of all domestic services, other than MTS and WATS, were "unjust and unreasonable under Section 201(b) of the Act" and "unlawfully discriminatory under Section 202(a) of the Act". *Id.* at 283-84. Subsequently, as TRAC noted, the Commission's unlimited resale and shared use policies were extended to switched voice service in 1980 and reaffirmed with respect to cellular services in 1981. Complaint at 7-8, *citing* Policies Concerning Resale and Shared Use of Common Carrier Domestic Switched Network Services, 83 FCC 2d 167 (1980) and *Cellular Resale*, *supra*, respectively.

[28] Reply at 9.

[29] *Id.* at 12. TRAC notes that DCTC expressly denied its allegation before the court that all of DCTC's resale agreements contained an exclusivity provision. In light thereof, TRAC asserts that it is disengenuous for DCTC to claim that its exclusivity arrangement with TRAC was not discriminatory. *Id.*

[30] *Id.* at 13-18.

[31] *Id.* at 18.

[32] *Id.* at 18-22.

[33] *Id.* at 13.

[34] *Resale*, *supra*, 60 FCC 2d at 264, 321.

[35] Resale and Shared Use of Common Carrier Domestic Switched Network Services, 83 FCC 2d 167, 193 (1980) (*Resale of Switched Services*).

[36] *Id.* at 194.

[37] *Cellular Resale*, *supra*, 86 FCC 2d at 511.

[38] CTC had requested a declaratory ruling that would have permitted it to deny cellular resale capacity to NYNEX-R, contending that such action would serve to enhance competition and further the objectives of the antitrust laws. The Department of Justice (DOJ) filed comments supporting CTC's position. The Commission found that the requested declaratory ruling was an inappropriate forum for determining whether a departure from its resale policy was warranted, treated the comments of CTC and DOJ as petitions for Rule Making, *Id.* at 6275, and simultaneously commenced a proceeding (RM 6539) inviting comments concerning the extent to which the Commission should continue to apply its resale policy. Notice to File Comments on Continued Application of Commission's Resale Policy, 3 FCC Rcd 6302 (1988).

[39] National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 641 (D.C. Cir.), *cert. denied*, 425 U.S. 999 (1976). *See also* Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238, 1255-57 (1982), *aff'd sub nom.* Wold Communications v. F.C.C., 735 F.2d 1468 (D.C. Cir. 1984); Comark Cable Fund III v. Northwestern Indiana Telephone Co., 3 FCC Rcd 3096, 3097 (1988), *appeal docketed*, No. 88-1521 (D.C. Cir. July 22, 1988).

[40] *See Cellular Resale, supra; Cellular Telephone, supra.*

[41] The fact that the Commission recently invited comment on whether its policy should be revised at some future time does not excuse a carrier's failure to comply with outstanding orders of the Commission or conditions in radio authorizations that mandated unrestricted resale of cellular services.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of
IT&E OVERSEAS, INC.

For Authority to Construct a Two-Way Paging Facility in the Public Land Mobile Radio Service on Frequency 152.060 MHz at Tamuning, Guam — File No. 21523-CD-P/L-01-88

For Authority to Construct a One-Way Paging Facility in the Public Land Mobile Radio Service on Frequency 152.84 MHz at Tamuning, Guam — File No. 22102-CD-P/L-01-88

MEMORANDUM OPINION & ORDER

Adopted: April 17, 1989; Released: April 24, 1989

By the Acting Chief, Mobile Services Division:

I. BACKGROUND

1. IT&E Overseas, Inc. (IT&E) has filed the captioned applications requesting authority to construct a two-way paging facility to operate on frequency 152.060 MHz, and a one-way paging facility to operate on frequency 152.84 MHZ, at Tamuning, Guam.[1] Motorola, Inc. (Motorola), a nonwireline, mobile radio service provider in the territory of Guam, requests that the Commission deny or dismiss the applications of IT&E,[2] or in the alternative, designate the applications for hearing pursuant to Section 309(e) of the Communications Act of 1934, as amended. [3] Responsive pleadings were filed.[4]

2. In its Petition to Deny, Motorola reiterates those arguments set forth in its petitions to deny the original applications. *See* note 1, *supra*. Specifically, Motorola argues that IT&E has engaged in unlawful premature construction of the proposed facilities and that IT&E has exhibited a lack of candor with the Commission in its applications regarding that construction. In addition, Motorola argues that principals of IT&E have engaged in bribery of Guam government officials in connection with IT&E's telephone operations. This conduct, Motorola argues, raises a serious question as to IT&E's character qualifications to be a Commission licensee. In opposition, IT&E generally denies the allegations raised by Motorola, and disputes their relevance to established Commission guidelines for determining character qualifications. In addition, IT&E disagrees with the various conclusions and interpretations of IT&E's actions made by Motorola, and challenges Motorola's own qualifications to be a Commission licensee.

II. PREMATURE CONSTRUCTION / LACK OF CANDOR

A. Contentions

3. Motorola argues that IT&E has prematurely constructed the antennas for the proposed one-way and two-way facilities in violation of Section 319(a) of the Communications Act[5] and Section 22.43(a)(1) of the Rules.[6] In support of its allegations, Motorola submits statements and photographs previously submitted in connection with its petitions to deny IT&E's original applications. *See* note 1, *supra*. Specifically, Motorola submits declarations that the antennas for the proposed facilities were fully constructed as of December 1985, before the 1986 applications were filed, and attaches photographs of the construction site. However, Motorola argues, IT&E's applications indicated that the antenna structures for the one-way and two-way facilities were not yet built. This, Motorola argues, raises an issue as to IT&E's candor to the Commission.

4. In addition, Motorola argues that IT&E has attempted to circumvent the Part 22 (Public Mobile Service) requirement that a licensee have prior authorization before construction, by filing an application to provide Private Land Mobile Radio Services, a service in which pre-authorization construction is permitted. Motorola states that IT&E sought and received authorization to provide private mobile services to business users from the same site proposed in its present applications. IT&E, Motorola argues, intends to use these facilities for its Part 22 operations.

5. In opposition, IT&E contends that the antenna installations in question were not prematurely constructed. IT&E states that the two-way antenna and pole mount were installed in December of 1985 to be used by the Wiltec Guam, Inc. private radio system, licensed to station KNDP693 and operating on frequency 152.36 MHz, and not for IT&E's use. IT&E states that only if its application is granted will it convert this facility to common carrier use. In any case, IT&E notes that the transmitter will require a new crystal to convert to the frequency requested in the two-way application. In reference to the one-way application, IT&E states the one-way antenna was installed as a receiver only for propagation studies in connection with station KNKDP693. IT&E further states that although the antenna is currently in place, there is no equipment attached to it, and that it will not be used for the proposed one-way facilities.[7] IT&E asserts, therefore, that since the one-way antenna will not be used for the proposed one-way facility, and the two-way antenna is not ready for operation, Motorola's allegations regarding lack of candor lack merit.

B. Discussion

6. Section 319(a) of the Act and Section 22.43 of the Rules prohibits an applicant from commencing station construction prior to receipt of Commission authorization. In this regard, the installation of a radio antenna or pre-authorization construction of a tower is prohibited. *MCI Telecommunications Corp.*, 3 FCC Rcd 509 (1988), *as supplemented*, FCC 88-49, (released February 18, 1988), *appeal pending sub nom., Telestar v. FCC*, No. 88-1153 (D.C. Cir. filed February 26, 1988) (*MCI Telecommunications).* [8] Facilities constructed for a legitimate alternative purpose, however, are considered not to fall within the prohibitions against premature construction. *Spectrum*

Communications Inc., 40 FCC 2d 467, *recon. denied*, 44 FCC 2d 1010 (1973). *See also MCI Telecommunications*, 3 FCC Rcd at 510.

7. We find that that there is no credible evidence that IT&E engaged in improper construction at the two-way or one-way sites proposed in the application. IT&E has provided unrebutted evidence that the antennas were constructed for legitimate purposes. Specifically, the two-way antenna was constructed at the site for use by the Wiltec private radio system and that the one-way antenna was constructed for legitimate propagation studies. In contrast, Motorola has provided nothing but mere speculation that IT&E intended to violate our Rules. In these circumstances, we find that there is no substantial and material question of fact requiring a hearing on the premature construction issue, and reject Motorola's request for a hearing.

8. We further find no evidence of a lack of candor in IT&E's applications for the proposed facilities. IT&E states that it has no plans to use the one-way antenna for the proposed one-way facilities, and no evidence has been submitted to the contrary. Thus, IT&E correctly indicated in its application that the antenna was proposed. With respect to the application for two-way services, IT&E has indicated in its pleadings that it intends to convert the Wiltec private radio facility to common carrier use if the proposed application is granted. Given its intention, the antenna for the two-way application would have been more aptly described as "existing". However, IT&E has explained that the antenna is not in fact ready for operation, and given the circumstances, we find the mistake to be inconsequential.

III. CHARACTER QUALIFICATIONS

A. Contentions

9. Motorola argues that principals of IT&E have engaged in bribery of government officials and, therefore, IT&E is not qualified to be a Commission licensee. Specifically, IT&E alleges that the current president of IT&E, John Borlas, was indicted on charges of bribery and conspiracy in 1986 in connection with his attempt to bribe the Governor of Guam in order to further IT&E's telephone operations. An applicant who resorts to criminal misconduct and political corruption to promote his business, Motorola contends, cannot be trusted to deal truthfully with the Commission, and is therefore, not qualified to be a Commission licensee. Motorola further alleges that the indictment against Borlas was dismissed in exchange for Borlas' trial testimony against the Governor of Guam. According to Motorola, Borlas admitted to giving money to the Governor in the subsequent testimony. The conviction of the Governor, therefore, Motorola argues, constitutes an adjudication of Borlas' misconduct.

10. In opposition, IT&E states that Borlas' indictment is not relevant to its qualifications to be a Commission licensee. Citing *Policy Regarding Character Qualification In Broadcasting*, 102 FCC 2d 1179, 1183 (1986), *recon. denied*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association of Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987 (*Character Qualification Policy Statement)*. IT&E contends that the Commission guidelines for character qualifications "focus generally on three types of adjudicated conduct which are not specifically proscribed by the Act or our rules or policies: "(1) fraudulent statements to government agencies; (2) certain criminal convictions; and, (3) violations of broadcast related anticompetitive and antitrust statutes," *Character Qualification Policy Statement*, 102 FCC 2d at 1195, none of which is present here. In addition, IT&E challenges Motorola's equitable standing to raise the qualification issue. Motorola, IT&E states, has pled guilty to government contract fraud and therefore, is itself unqualified to be a Commission licensee.

11. In reply, Motorola argues that bribery involves dishonesty, and thus, is relevant to the character qualifications of a Commission licensee. Further, Motorola argues that the dismissal of the indictment of Borlas is analogous to a plea of *nolo contendre*, and thus is relevant to the character qualification issue. In addition, Motorola argues that its own qualifications are irrelevant to the instant proceedings.

12. In its supplement to its Opposition, IT&E submits documentation stating that the Governor's convictions have been reversed and set aside on appeal, *United States v. Bordallo*, Case No. 87-1092, CR 85-000049, slip op. (9th Cir. released August 15, 1988), and reiterates its challenges to Motorola's character qualifications. In response, Motorola argues that the reversal of the bribery convictions does not resolve all of the outstanding allegations against IT&E's applications.

B. Discussion

13. Motorola has not provided sufficient evidence to the Commission to raise a material question of fact regarding the character qualifications of IT&E. While the allegations raised by Motorola concerning bribery leveled against Borlas are within the range of non-FCC related misconduct[9] considered relevant to our inquiry, we will not sanction inquiry into an applicant's qualifications on the basis of alleged criminal activity unless it results in a conviction or adverse civil decision.[10] In this case, not only has the indictment against Borlas been dismissed,(*see* ¶ 9, *supra)*, but the conviction of Bordallo has been reversed (*see* ¶ 12, *supra)* because the federal law under which Bordallo was convicted on the bribery charges was not applicable to the conduct engaged in by Borlas. Therefore, although Borlas may have admitted making a payment to Bordallo, the Ninth Circuit held that such conduct did not constitute the crime for which Bordallo was convicted. In these circumstances, we do not find there to be a substantial and material question of fact concerning IT&E's character which would warrant inquiry into IT&E's qualifications to be a Commission licensee.[11]

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's Rules that the application of IT&E Overseas, Inc., File No. 21523-CD-P/L-01-88 IS GRANTED.

15. IT IS FURTHER ORDERED, pursuant to Section 0.291 of the Commission's Rules that the application of IT&E Overseas, Inc., File No. 22102-CD-P/L-01-88 IS GRANTED.

16. IT IS FURTHER ORDERED, that the Petition to Deny the two-way paging facility at Tamuning, Guam. filed by Motorola, Inc. IS DENIED.

17. IT IS FURTHER ORDERED, that the Petition to Deny the one-way paging facility at Tamuning, Guam. filed by Motorola, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J.Vogt
Acting Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] IT&E previously filed applications for authority to construct and operate a two-way facility, File No. 22351-CD-P/L-01-86, and one-way facility, File No. 22034-CD-P/L-01-86, for the same frequencies and the same sites (hereinafter "original applications"). Motorola filed Petitions to Deny these applications. At the request of IT&E, these applications were dismissed without prejudice.

[2] Motorola filed the petition to deny the two-way application, File No. 21523-CD-P/L-01-88 on February 16, 1988, and the petition to deny the one-way application, File No. 22102-CD-P/L-01-88 on March 14, 1988. IT&E has filed a Motion to Consolidate consideration of the two petitions, and Motorola has filed Comments to the Motion. Because of the similarity of factual and legal issues presented, we have granted IT&E's request, and consolidated the proceedings for the purposes of decision.

[3] 47 U.S.C. §309. Section 309(e) requires the Commission to designate an application for hearing if there is a "substantial and material question of fact" raised with respect to whether grant of the application would serve the public interest, convenience and necessity. *See Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 394-95 (D.C. Cir. 1985).

[4] Specifically, IT&E has filed an Opposition, a Motion to Supplement its Opposition, and a Motion to Dismiss the Petition to Deny. Motorola has filed a Reply, an Opposition to the Motion to Supplement, and an Opposition to the Motion to Dismiss. Because of the significant issues raised by the parties, we will address the merits of Motorola's petitions to deny, and all related substantive pleadings. Accordingly, we grant IT&E's Motion to Supplement its Opposition, and deny IT&E's Motion to Dismiss.

[5] 47 U. S.C. §319. Section 319(a) of the Act provides, that "no license shall be issued . . . for the operation of any station unless a permit for its construction has been granted by the Commission."

[6] 47 C.F.R. §22.43. Section 22.43(a)(1) of the Rules provides, in pertinent part, that a "radio station authorization shall specify the date of the grant as the earliest date for the commencement of construction."

[7] IT&E further states that it also operates a private paging service from that site on frequency 152.48 MHz which will not be converted to common carrier use as Motorola speculates.

[8] Certain "preliminary steps", having no "intrinsic" radio communication use "related to the proposed facility", are not considered premature. For example, site clearance, pouring of concrete footings for a tower, installation of a tower base and anchors, installation of a new power line, purchases and on-site storage (but not installation) of radio and equipment have been allowed. *See Christian Broadcasting of the Midlands, Inc.*, 103 FCC 2d 375 (1986), *recon. denied*, 2 FCC Rcd 6404 (1987); *King County Broadcasters*, 55 Rad. Reg. 2d 1591, 1592 (1984), *overruled on other grounds*, 60 Rad. Reg. 2d 1391 (1986); *Patton Communications Corp.*, 81 FCC 2d 336, 338 (1980); *Childress Broadcasting* Corp., 24 Rad. Reg. 2d 669 (1962).

[9] Non-FCC related misconduct describes misconduct which may be a violation of law but does not specifically contravene the Communications Act or a specific Commission rule or policy. *Character Qualifications Policy Statement*, 102 FCC 2d at 1183. We note that the character qualification standards outlined for broadcast area in the *Character Qualification Policy Statement* are not directly applicable to common carriers, however, the standards have been used to provide guidance in common carrier cases. *See e.g., MCI Telecommunications*, 3 FCC Rcd at note 14.

[10] "We will not take cognizance of non-FCC misconduct involving criminally fraudulent misrepresentations, alleged criminal activity and antitrust or anticompetitive misconduct unless it is adjudicated. In this regard, there must be an ultimate adjudication by an appropriate trier of fact, either by a government agency or court, before we will consider the activity in our character determinations." *Character Qualifications Policy Statement*, 102 FCC 2d at 1205.

[11] This proceeding is not the proper forum to raise character qualification issues against Motorola, and accordingly, those allegations will not be considered.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

LA STAR CELLULAR TELEPHONE CO. File No. 27161-CL-P-83

and

NEW ORLEANS CGSA, INC. File No. 29010-CL-P-83

For a construction permit to operate on frequency Block B in the Domestic Cellular Radio Telecommunications Service in the New Orleans, LA MSA

and

LA STAR CELLULAR TELEPHONE CO. File No. 00794-CL-L-88

For interim operating authority on frequency Block B in the Domestic Cellular Radio Telecommunications Service in the northern portion of the New Orleans, LA MSA

MEMORANDUM OPINION AND ORDER

Adopted: April 18, 1989; Released: April 24, 1989

By the Commission:

1. New Orleans CGSA, Inc., (NOCGSA) is the wireline licensee in the New Orleans Metropolitan Statistical Area (MSA), one of the top-30 cellular markets. Its unopposed application for the wireline frequency block in the New Orleans MSA was granted in July 1983. On August 17, 1983, NOCGSA filed its captioned application for a major amendment to its construction permit, requesting authorization to serve part of the northern portion of the New Orleans MSA (St. Tammany Parish), which it had not requested in its original application. La Star Cellular Telephone Company (La Star) filed its mutually exclusive (captioned) application on September 16, 1983. We rejected La Star's application as untimely and granted NOCGSA's amendment. La Star appealed, and in *Maxcell Telecom Plus v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987), the U.S. Court of Appeals required the Commission to reinstate La Star's application *nunc pro tunc*. The Court acted on the basis of its finding that La Star did not have sufficient notice that it could not file a mutually exclusive application against the existing licensee's expansion application.

2. We reinstated La Star's application and on September 28, 1987, placed it on public notice for comment. Simultaneously, we set aside NOCGSA's license to serve St. Tammany Parish and granted NOCGSA special temporary authority (STA) to continue its operations in that area for 180 days, renewable as required.[1] Shortly before the public notice was issued, La Star filed an application for interim operating authority in St. Tammany Parish.[2] La Star also has filed a Petition for Interim Operating Authority, two Applications for Review of Special Temporary Authority grants by the Common Carrier Bureau, and a Motion to Strike. In addition, NOCGSA has filed a Petition to Reject or, In the Alternative, To Dismiss and Deny the application for interim operating authority. Responsive pleadings have been filed by the parties. Additional pleadings have been filed regarding the parties' individual and comparative qualifications to receive the wireline license for St. Tammany Parish, which will be addressed in a separate order. For the reasons described below, we affirm the Common Carrier Bureau's grant of special temporary operating authority to NOCGSA, grant NOCGSA interim operating authority until a final decision is reached in this proceeding, and deny La Star's requests for interim operating authority and its applications for review.

Parties' Arguments

La Star's Request for Interim Operating Authority

3. In its request for interim operating authority, La Star proposes to serve St. Tammany Parish jointly with NOCGSA. In the alternative, it requests that a third party be appointed interim operator in the area. La Star states that NOCGSA should not have been permitted to construct and operate a cellular system in St. Tammany Parish, and that La Star is significantly prejudiced because it must compete against an existing operator. La Star argues that "it is an abuse of discretion for the Commission to give a procedural preference to the existing operator, as opposed to merely weighing the fact of its present operation, when comparing it on an equal basis with others who propose to operate the station in the interim," citing *Consolidated Nine, Inc. v. FCC*, 403 F.2d 585, 595 (D.C. Cir 1968).

4. La Star's central concern is that "[a]s long as NOCGSA is permitted to continue unfettered operations in the contested area, La Star cannot expect to receive a fair hearing." La Star points out that in *Ashbacker Radio Corporation v. FCC*, 326 U.S. 327 (1945) the Court states that a newcomer faces practical difficulties in making a showing sufficient to displace an established licensee. La Star argues that the Commission "may weigh its decision in favor of the interim operator's demonstrated past performance as against the promised future performance of the competing applicant," citing *Community Broadcasting Company v. FCC*, 274 F.2d 753 (D.C. Cir. 1960). It believes that "[t]ry as it might, the Commission may be unable to ignore NOCGSA's investment, its track record and its earlier determination that NOCGSA should be the permanent licensee." La Star also argues that the substantial investment required to construct the station could weigh in favor of NOCGSA.

5. La Star states that allowing it to serve with NOCGSA as a joint interim operator "would best serve the public interest." It also states that appointing a third party interim operator "would best conform with Commission policy." La Star argues that an "entity composed of the competing applicants for permanent authority will mini-

mize the likelihood of significant prejudice to the ultimate disposition of the system resulting from an interim grant to it," citing *Beloit Broadcasting*, 365 F.2d 962, 963-4 (D.C. Cir. 1966).

6. La Star states that the Commission could require NOCGSA's facilities to go off the air if it does not make its facilities available for joint operating authority or if it should demand unreasonable terms. La Star cites *Consolidated Nine*, *supra*, for the proposition that "[t]he public has a far greater interest in the fairness of the licensing process than simply adding or keeping one more broadcast facility on the air."

7. In opposition, NOCGSA argues that its continued service in the contested area will not result in any prejudice to La Star. NOCGSA argues that the Commission has viewed payment of construction and related costs associated with grant of interim operating authority as the chief threat to comparative proceedings. It states that such investment has also been the concern of the courts, citing *Community Broadcasting Company*, *supra*. NOCGSA points out that it made all of the investment necessary to serve the contested area shortly after its expansion application was granted in 1984. It states that "authorizing [NOCGSA] to continue to serve the contested area will not result in any investment by [NOCGSA] that could in any way be prejudicial to La Star."

8. NOCGSA maintains that *Consolidated Nine, Inc. v. FCC*, *supra*, is different from the instant situation because the court in that case reversed the grant of interim operating authority to a competing party who had already made an investment, not because the investment continued to pose a threat to the comparative proceedings but because the Commission had acted arbitrarily in deciding which party would receive temporary authority and because it had assumed that interim operation by the existing operator was a preference.

9. NOCGSA also states that its temporary authorization does not pose any other threat to La Star. NOCGSA argues that the "track record" that it would compile while serving the contested area would not be a disadvantage to La Star because there has already been a "track record" compiled both in the contested area and in the uncontested portion of the New Orleans MSA. In addition, NOCGSA denies that La Star would be disadvantaged by the fact that the profits generated in the contested area may provide some financial support to NOCGSA's litigation costs. NOCGSA points out that both its parent and La Star's owners are financially capable of supporting a comparative proceeding independently of profits generated by cellular operations in the contested area.

10. In addition, NOCGSA argues that the public interest requires that it continue to serve the contested area, even if such interim service might prejudice La Star in comparative proceedings for permanent service. NOCGSA contends that the fact that it is currently operating in the St. Tammany area "is entitled to weight," citing *Consolidated Nine, Inc.*, *supra*. NOCGSA further contends that severing the contested area from the total service area, as La Star has proposed, would create a competitive disadvantage vis-a-vis the nonwireline cellular licensee in New Orleans, and "would be detrimental to the continuity of service expected by [NOCGSA's] customers and the cost of that service."

11. NOCGSA also argues that "some nominal form of participation" by La Star in sharing of expenses and revenues "would hardly give La Star any track record that would benefit it in comparative proceedings. Nor would such participation change the substance of [NOCGSA]'s activities and performance in providing interim service in the contested area." If La Star were to have a management role, such a role "would inevitably involve it in not just the constested area but also in all other areas of the MSA." NOCGSA maintains that it would mean considerable cost and inefficiency to market, serve, and plan the New Orleans cellular system as if it were two separate systems. In addition, La Star would have access to NOCGSA's proprietary information.

12. NOCGSA also notes that a management role for La Star could jeopardize NOCGSA's state authorizations, or, at a minimum, require new operating and tariff authorizations. NOCGSA states that "[u]nlike prior interim operation cases that have confronted the Commission, this case involves common carrier, not broadcast operations. Thus, the state, as well as the Commission, has jurisdiction."

La Star's Applications for Review of NOCGSA's Special Temporary Authority

13. Although La Star's application for review essentially repeats arguments it made in its request for interim operating authority, it makes two additional arguments. First, La Star argues that the Bureau acted incorrectly by granting special temporary authority under Section 22.25 of the Rules. [3] La Star argues that the Bureau should have considered Section 22.32(g) instead, which pertains to temporary grant of one or more mutually exclusive applications pending a final decision on the applications.[4] La Star acknowledges that "[a]fter NOCGSA's grants to operate in the northern portion of the New Orleans MSA were vacated there was in fact a need for the prompt establishment of a radio service in that area," pursuant to Section 22.32(g)(2), but La Star argues that there is no need for NOCGSA solely to provide the service because joint operating authority is possible.

14. In addition, La Star argues that NOCGSA's parent, BellSouth Mobility, Inc., operates "two cellular systems in which the circumstances are exactly comparable to those La Star has proposed for the interim operator." La Star argues that an entity in Clarksville, Tennessee uses the Nashville cellular switch in such a manner that, from the subscribers' point of view, Clarksville is part of the Nashville service area. In addition, La Star says that the Lafayette, Louisiana system is owned and operated separately, but is indistinguishable to customers from the Baton Rouge system.

15. In response, NOCGSA states that La Star is "incorrect when it states that the examples it cites are 'exactly comparable' to its proposed interim joint operation of the northerly portion of the New Orleans wireline system." NOCGSA points out, through affidavit of Mr. Roy Ethridge, the General Manager (New Markets) for BellSouth Mobility, that in both the Nashville/Clarksville and the Lafayette/Baton Rouge examples, "the individual systems are under the control of and operated by the same *single* entity." The sole general partner in each market pair is BellSouth Mobility. In Nashville and Clarksville, where the same partnership controls both systems, the two cellular systems share the same switch. In Lafayette and Baton Rouge, there are two different partnerships and the Lafayette system leases switch capacity

from the Baton Rouge system. Moreover, roamer and toll charges apply in this case.[5] Mr. Ethridge, on behalf of NOCGSA, also affirms that the La Star proposal would result in increased cost of operation and disruption in service practices because joint interim operation will require the formation of a general partnership and, therefore, new management for the northern portion of the New Orleans MSA. If operation by a third party were imposed, Ethridge notes that there would still be management for the north portion separate and distinct from the management for the south portion. Moreover, Ethridge argues that any new operating entity established for the north portion would have to acquire the existing equipment, facilities and customer base of the north portion. Ethridge states that this would require asset valuation and transfer costs, the need to obtain switching capability, a new billing system, and would result in increased costs stemming from the apportionment of NOCGSA's existing field and administrative personnel.

16. As a prerequisite to our discussion of specific public interest findings herein, we take notice of the geographical environment in which this controversy is taking place. First, we note the definition of a Metropolitan Statistical Area discussed in the 1980 Census report:

> The general concept of a metropolitan area is one of a large population nucleus, together with adjacent communities which have a high degree of ecomonic and social integration with that nucleus. . . . The SMSA's are designated . . . following a set of official published standards developed by the interagency Federal Committee on Standard Metropolitan Statistical Areas. . . . [O]utlying counties must have a specified level of commuting to the central counties and must also meet certain standards regarding metropolitan character, such as population density, urban population, and population growth. (Appendix A).

17. St. Tammany Parish is one part of the New Orleans MSA. The other major sectors are the city of New Orleans and counties extending from the city through oil fields and other business interests to the Gulf of Mexico. The Census Bureau identified the New Orleans MSA (as it did all other MSAs) as comprised of areas with a community of interest such that the included areas should be considered a demographic unit. NOCGSA, as the Block B[6] licensee of the New Orleans MSA, operates its cellular system in a unified manner within the MSA. There is a single switch and unified management structure, bookkeeping methodology, marketing structure, and other aspects of doing business are unified.

18. NOCGSA faces a competitor on Block A which is similarly situated. The competitor, too, has a defined geographic area to serve and its service area includes St. Tammany Parish and the city of New Orleans. Each competitor has customers who have come to rely on cellular service. Most cellular companies serve a wide variety of customers, including businesses of all types, professionals, and social and emergency services. Cellular customers enter into service contracts with the company or reseller of their choice, and generally may make calls within the MSA at a "local" rate, or long distance calls at varying higher rates.

19. In its various pleadings, La Star has proposed four alternatives for interim operating authority in the disputed area of St. Tammany Parish during the pendency of this controversy: 1) that NOCGSA's operations in St. Tammany Parish be discontinued and no service take its place; 2) that La Star be permitted to construct and operate its own cellular system in St. Tammany Parish; 3) that La Star and NOCGSA provide joint operations in St. Tammany Parish; and 4) that a third party take over cellular operations in St. Tammany Parish. On September 8, 1988, La Star filed a further pleading pertaining to interim operating authority entitled "Opposition to Extension of Special Temporary Authority Granted to New Orleans GCSA, Inc." In that pleading, La Star advanced a further argument that if interim operating authority is granted to NOCGSA, then the Commission should impound its profits resulting from operation of the disputed facilities.

DISCUSSION

20. This appears to be the first time the Commission has considered issues relating to conditional interim operating authority in the common carrier services. Prior Commission and court cases construing the Commission's authority to select interim operators have concerned broadcast services only. Nevertheless, the general statutory policies surrounding interim operations are similar for both services, and the Commission's rule governing interim grants of common carrier applicants is similar to the broadcast rule interpreted in previous cases. Therefore, the law and policies reflected in broadcast cases clearly have a bearing on these proceedings. As discussed more fully below, however, public interest factors arise in the common carrier context, and particularly in this case, that do not exist in the broadcast services. These factors also have a significant bearing on the ultimate selection of an interim operator in these proceedings.

21. The starting point for our analysis is section 22.32(g) of the Commission's rules, which provides for grant of conditional authority to one or more mutually exclusive applications pending a lottery or comparative hearing in specified circumstances.[7] In particular, section 22.32(g)(2) permits interim authorization when "the public interest requires the prompt establishment of radio service in a particular community or area . . . ." An identical provision of the rules applying to broadcast services was construed in *Community Broadcasting Co. v. FCC*, 274 F.2d 753 (D.C. Cir. 1960), the leading case concerning interim broadcast operations. The court therein established guiding principles to be considered in selecting interim operators pending comparative proceedings, which were designed to ensure due regard for the applicants' rights to a fair comparative proceeding for the regular license. *See Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). Specifically, the court said, interim authority to a single competing applicant is an "extraordinary procedure" that should be reserved for circumstances in which service is " *so* immediately and imperatively necessary that it must be granted at once in spite of the great financial risk of one party and the possible prejudicial effect on the other who is not favored . . . ." *Community Broadcasting*, 274 F.2d at 762 (emphasis in original). In the broadcast context, the court suggested that the public interest in interim operations might over-

balance the possible prejudice to competing applicants, where, for example, a community had no existing service or would otherwise lose its only service. *Id.* at 763.

22. Subsequently, in *Consolidated Nine, Inc. v. FCC*, 403 F.2d 585 (D.C. Cir. 1968), the court elaborated on the public interest balancing that is pertinent to interim operations in circumstances that are more closely analogous to the facts before us; namely, when one of the applicants for interim authority is already operating the service without having received a valid grant of authority.[8] Specifically, the court noted, the factor identified in *Community* that "most heavily prejudices" the rights of competing applicants is the investment made by the applicant for interim authority. *Id.* at 594. Thus, the fact that there would be no new financial investment if an existing operator were awarded interim authority was entitled to weight, the court said. Further, the court observed, the Commission would be permitted to consider facts that revealed there were disadvantages to joint interim operations and that continuity of service would be better served by the existing operator than by a new operator who might be forced to construct new facilities. Ultimately, however, the court in *Consolidated Nine* found the factors described above insufficient to support the Commission's determination to award interim authority to the existing operator because, in that case, the Commission's award had contravened its own rule requiring that interim operations in the broadcast services be open to all applicants.[9]

23. Unlike the situation in *Consolidated Nine*, the Commission rules governing cellular services do not expressly provide for joint interim operations. *Compare* 47 C.F.R. § 22.32(g) *with* 47 C.F.R. § 73.3592(b). Accordingly, there is no rule in the common carrier service that the Commission must afford a preference to interim applicants proposing joint operations.

24. Moreover, this case is distinguishable from *Consolidated Nine* because authorizing interim operation by a single applicant here fully satisfies the requirement of section 22.32(g)(2) of our rules and *Community Broadcasting* that service be immediately and imperatively necessary.[10] Unlike many cases involving loss of service to users of existing broadcast services, discontinuance of service here might have a more severe and immediate impact on NOCGSA customers, many of whom rely on cellular service for business purposes and who, presumably, would need to make immediate arrangements to replace this service. Furthermore, an important aspect of our policies for the cellular service has been to "foster healthy marketplace competition from the outset." *Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 98 FCC 2d 175, 184 (1984). Our change from a "headstart" policy to the implementation of a lottery system in the cellular service thus was expressly designed to enable both wireline and nonwireline carriers to initiate service and compete for customers at about the same time, thereby avoiding possible barriers to entry for later entrants which might be inimical to effective competition. *See id.* at 184 and n.28. In the instant case, if no interim operation were to be provided, service to NOCGSA's customers would be disrupted and only one facilities based cellular company, a monopoly nonwireline provider, would remain to serve St. Tammany Parish. This result would be inconsistent with our strong policy against such service disruptions where possible and our belief that the public interest is best served by requiring, from the outset, facilities based competition between cellular licensees. Accordingly, we conclude that the public interest strongly supports and requires continuation of interim service in this case.

25. Having determined that interim service is required in the public interest, we next consider and balance other public interest factors affecting the outcome, including the possible prejudice to La Star that might occur if we were to affirm the award of an interim grant to NOCGSA rather than to adopt either the joint or third party proposals of La Star.[11] As the court pointed out in *Consolidated Nine*, the greatest prejudice to the comparative process stems from the difficulty of disregarding the financial investment made by an interim applicant. However, the court noted that if that investment has already been made, the award of an interim grant would not, by itself, result in any additional expenditures by the applicant. 403 F.2d at 594. Here, NOCGSA made the investment necessary to serve the contested area shortly after its expansion application was granted in 1984.[12] Therefore, the danger of prejudice to the comparative process resulting from financial investment would not be significantly increased in this case by an award to NOCGSA of interim authority.

26. The *Consolidated Nine* court was concerned, however, that the very fact of prior existing operations by an interim applicant might result in prejudice to competing applicants, particularly if the Commission viewed the existing operations as the "status quo" that should be preserved. *Id.* at 594-95. We do not in this case view NOCGSA's existing operation as the "status quo" to be preserved. Moreover, given our conclusion that continued operation is required in the public interest, the only alternatives that could serve to lessen any possible prejudice to La Star would be to adopt the alternative proposals of joint interim operation or third party operation. We have carefully considered these possibilities, but, as discussed below, other factors associated with them significantly outweigh any concern that the Commission will view NOCGSA's existing operation as the "status quo" to be preserved.

27. In the broadcast area, and in circumstances where there was no existing operator, the Commission's policy following the *Community* decision was to authorize joint interm operations by applicants in the comparative proceeding, thereby reducing potential prejudice to the comparative process. *See, e.g., Beloit Broadcasters, Inc. v. FCC*, 365 F.2d 962 (D.C. Cir. 1966). Given the serious management problems inherent in joint operations by competing applicants and to avoid prejudicing the outcome of the comparative proceeding, the Commission has preferred, however, to award interim grants to third parties who are not regular applicants. *See Newark Radio Broadcasting Ass' n. v. FCC*, 763 F.2d 450, 452 (D.C. Cir. 1985). In recent years, third party interim authority applicants have been selected after oral argument before the Review Board, and, despite the use of expedited procedures, the process of soliciting and selecting the applicant has taken a considerable period of time. *See id.* at 452-53 (one year and five months between solicitation of interim applications and Commission decision).[13] In our view, neither alternative is preferable in the present situation.

28. The inherent difficulties associated with joint interim management by adversary parties are obvious and counsel against the use of joint interim operation in the proceedings before us. *See Consolidated Nine*, 403 F.2d at 593. As to third party operation, it is unclear that any non-applicant would have a financial or other incentive to offer these non-broadcast services on an interim basis, particularly if a substantial initial investment is required. Furthermore, even if interim applicants step forward, it could take a considerable time before a third party operator is selected and commences operation, especially if it were necessary to construct new facilities. *See Consolidated Nine*, 403 F.2d at 593; *see also* note 7, *supra*.

29. In addition to the foregoing considerations, both joint interim and third party operation present special difficulties in the cellular service, and in this case in particular, that have not arisen in broadcast cases. NOCGSA, as the Block B licensee of the New Orleans MSA, operates its cellular system in a unified manner within the MSA. It employs a single switch and unified management, accounting, and marketing structure. Thus, for example, NOCGA's customers enter into service contracts with the company that cover all calls within the MSA, encompassing both the areas in which NOCGSA is the undisputed licensee and the contested areas in question here. Devising a method to allocate NOCGA's costs, plant, subscribers, and revenues between the main portion of the MSA and St. Tammany Parish, solely for purposes of establishing an interim operation, would be complex, time consuming, potentially disruptive to NOCGSA's customers, and, in all likelihood, the subject of much contention between the affected parties.[14] Indeed, there is no assurance that NOCGSA would even make its facilities available to a third party operator, and construction of duplicate facilities in these circumstances would be economically wasteful. *See* note 7, *supra*.[15] In addition, NOCGSA's operations (and the operations of any alternative interim operator) are regulated under state law and subject to state certification and tariffing requirements that could be affected by an interim change in the operator of the company, thereby leading to further possible delays and expenses.[16]

30. On balance, we believe the difficulties associated with joint or third party interim operation discussed above substantially outweigh the benefits of using those procedures in this case. The purpose of either alternative procedure would be to reduce the possibility of prejudice to La Star in any comparative proceeding, but as noted above, that concern is not so pronounced here because NOCGA's interim operation will not require further financial investment on its part and NOCGSA's interim operation will not be grounds for any comparative advantage. In addition, we have decided that any comparative proceeding will be conducted using the expedited hearing procedures in section 22.916(b) of the rules.[17] Thus, we intend to limit the period of interim operation to the shortest period possible.[18] Finally, dispensing with these alternative approaches will avoid dissipating resources in a complex and time consuming effort to establish joint or third party interim operation. Instead, it will allow the resources of the parties and this Commission to be focused on the main objective, that of selecting, as quickly as possible, a permanent licensee.

31. Having decided that the public interest supports the grant of a conditional, interim license to NOCGSA, we next address La Star's request that the Commission impound any profits resulting from NOCGSA's interim operation. In the broadcast context, the Commission has sometimes impounded profits of interim licensees, but it has not done so in every case. *See generally Mary Kay Quinlan*, 85 FCC 2d 585, 591 (1981); *see, e.g., Community First Corp.*, 15 FCC 2d 822, *recon. denied*, 17 FCC 2d 479 (1969); (no impoundment); *Consolidated Nine, Inc.*, 15 FCC 2d 825, *recon. denied*, 17 FCC 2d 482 (1969) (no impoundment). In *Consolidated Nine*, which also involved interim operations by an existing applicant who had never received regular authority, the court of appeals expressly rejected arguments that the profit-making ability of an interim operator prejudiced the comparative process under *Community Broadcasting* principles, noting that "the only relevance of the economic pressures on the parties is in determining whether those pressures will influence the choice of the licensee . . . . [and] [t]he mere unfairness of the economic pressures on the one party or the other is not of paramount importance." *Id.* at 595. Accordingly, impoundment of profits is not required but is a matter that lies within our broad discretion.

32. In this case, we note that only a portion of NOCGSA's unified cellular system is at issue and the administrative costs of calculating a division of profits for the St. Tammany portion would likely be significant. We can discern no significant public interest reason for requiring NOCGSA to incur these costs. Since NOCGSA, whose parent company is BellSouth, clearly has the financial ability to finance these proceedings without use of these profits, impoundment would not assist La Star. Moreover, although NOCGSA is operating without regular authority due to a procedural error by the Commission, it has not been disqualified, nor has it engaged in any wrongdoing.[19] Accordingly, we conclude there is no equitable or public interest reason to require impoundment of NOCGSA's profits in this case.

33. The Commission may select an interim operator without engaging in comparative hearings if it is clear that the public interest would thus be served. *Beloit Broadcasters, Inc. v. FCC*, 365 F.2d 962, 963 (D.C. Cir. 1966). In addition, this public interest finding must be such as to outweigh the prejudicial impact an interim grant might have on the decision on the regular authorization. *Id.* at 963, citing *Community Broadcasting*, 274 F.2d 753.[20] As discussed above, the public interest requires interim service in this case in order to maintain a healthy competitive market in the New Orleans MSA and to continue uninterrupted service to NOCGSA's customers. Further, because there would be no additional investment expenditures by NOCGSA during the interim period, and in view of the difficulties, complexities, and delays that would be encountered if the Commission were to attempt to establish either joint interim or third party operation for a part of NOCGSA's unified system, the public interest supports NOCGSA's selection as the interim operator and outweighs any prejudice that might result in the regular licensing proceeding. We therefore affirm the Bureau's decision to grant interim operating authority to NOCGSA in St. Tammany Parish until a final decision is reached in this proceeding.

ORDERING CLAUSES

34. WHEREFORE, for the foregoing reasons, the decision of the Common Carrier Bureau, is HEREBY AFFIRMED to extent set forth above and interim operating authority for New Orleans CGSA, as set forth above, IS HEREBY GRANTED until a final decision is reached on the mutually exclusive applications of New Orleans CGSA, Inc., File Number 29010-CL-P-83, and La Star Cellular Telephone Company, File Number 27161-CL-P-83;

35. IT IS FURTHER ORDERED that the application filed by La Star Cellular Telephone Company, File No. 00794-CL-L-88, for interim operating authority in the New Orleans MSA IS DENIED;

36. IT IS FURTHER ORDERED that the Petition to Appoint La Star and NOCGSA As Joint Interim Operators Or To Appoint a Third Party Interim Operator To Serve The Northern Portion of the New Orleans MSA, the Applications for Review, and the Motion to Strike Second Supplemental Opposition of NOCGSA, Inc. to La Star Application for Review, all filed by La Star Cellular Telephone Company, ARE DENIED;

37. IT IS FURTHER ORDERED that the Petition of New Orleans CGSA, Inc., To Reject or, in the Alternative, To Dismiss and Deny the interim operating authority application of La Star Cellular Telephone Company, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] On March 28, 1985, NOCGSA filed a second application to further expand its operations in the St. Tammany Parish area (hereinafter the "modification application"). The Common Carrier Bureau granted that application on August 16, 1985, over La Star's protest. When the Commission reinstated La Star's September 17, 1983 application it also set aside the grant of NOCGSA's modification application because the application is mutually exclusive with La Star's reinstated application, and could not be granted if the Commission ultimately were to grant La Star's application. The Bureau's grant of special temporary authority permitted NOCGSA to continue operations in areas of St. Tammany Parish defined by both the August 17, 1983 and the March 28, 1985 application. *But see* note 7, *infra*.

[2] Although the application for interim operating authority was filed with the Secretary of the Commission prior to the issuance of the public notice of La Star's application, the Mobile Services Division staff did not receive the application until the day the public notice was issued.

[3] Section 22.25(c) of the Rules states in pertinent part:

> Temporary authorizations of operation not to exceed 180 days may be granted under the standards of Section 309(f) of the Communications Act where extraordinary circumstances so require. Extensions of the temporary authorization for a period of 180 days each may also be granted. . . ."

Section 309(f) of the Communications Act states in pertinent part:

> When an application subject to [30 day public notice] has been filed, the Commission . . . may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring temporary operations in the public interest and that delay in the institution of such temporary operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such temporary operations for a period not exceeding 180 days, and upon making like findings may extend such temporary authorization for additional periods not to exceed 180 days.

[4] Section 22.32(g) provides:

Whenever the public interest would be served, the Commission may grant one or more mutually exclusive applications expressly conditioned upon final action on the applications, and then either conduct a random selection process (in specified services under this rules part), or designate all mutually exclusive applications for a formal evidentiary hearing or (whenever so requested) follow the comparative evaluation procedures of Section 22.35, as appropriate, if it appears:

> (1) That some or all of the applications were not filed in good faith, but were filed for the purpose of delaying or hindering the grant of another application;
>
> (2) That the public interest requires the prompt establishment of radio service in a particular community or area;
>
> (3) That a delay in making a grant to any applicant until after the conclusion of a hearing on all applications might jeopardize the rights of the United States under the provisions of an international agreement to the use of the frequency in question; or
>
> (4) That a grant of one application would be in the public interest in that it appears from an examination of the remaining applications that they cannot be granted because they are in violation of provisions of the Communications Act, other statutes, or the provisions of this chapter.

[5] "Roamer" charges are those which apply to users of a cellular system other than the one(s) to which the users subscribe. For example, a New York based customer would subscribe to one of the New York cellular systems, and if the customer visited, for example, Chicago, and wished to use cellular service there, the individual would be required to register as a roamer. Air time charges to roamers are much greater than for subscribers. "Toll" charges are long distance charges.

[6] Block B is the corresponding block of frequencies licensed initially to a wireline carrier. Block A is the block of cellular frequencies reserved for initial licensing to a non-wireline carrier. After initial licensing, the frequency blocks may be purchased by any type of carrier.

[7] The Bureau granted special temporary authority to NOCGSA under sections 22.25(b)(3) and 22.25(c) of the rules, rather than under section 22.32(g). Although the provisions relied upon by the Bureau might be appropriately utilized for short grants of authority in cases of this nature, *see Fidelity Voices, Inc. v. FCC*, 477 F.2d 1248 (D.C. Cir. 1973), we believe that the ultimate decision as to interim authority for the areas covered by NOCGSA's 1983 and 1985 modification applications should be governed by section 22.32(g).

[8] The court distinquished from the facts before it two other types of broadcast cases: first, those in which the interim applicant had previously received a valid grant and second, cases, like *Community*, in which no present operator existed, either because a new frequency had been authorized or a prior licensee had been disqualified. In the second class of classes, the court noted that the Commission had applied *Community* standards by awarding interim grants to nonapplicants or to groups of applicants, thereby avoiding or minimizing prejudice to competing applicants. *Id.* at 590-91.

[9] The court noted:

> We do not hold that the Commission could not have made an award of interim operating authority pursuant to our grant of discretion pending the remand decision absent specific Commission rules to cover such a situation. What we hold is . . . that it was an abuse of discretion to apply rule 1.592(b) to these proceedings and simultaneously grant interim authority to [the existing operator] in violation of that rule.

Id. at 595.

[10] In *Consolidated Nine*, the court pointed out that the conditions of the Commission's broadcast rule which permitted one applicant to provide interim service in some circumstances, including when "prompt service" was required, had not been satisified. *See id.* at 592, n.12; *see also id.* at 595, noting that the community in question already received multiple broadcast station coverage.

[11] There is insufficient spectrum to permit both NOCGSA and La Star to operate interim systems. Nor would it make sense to permit La Star to construct duplicate facilities, as only one system can be licensed on a permanent basis and later sale of duplicate facilities would be unlikely. To the extent La Star wishes to offer cellular service or believes that the Bureau's actions have prejudiced its ability to offer cellular service, we note that it has the option of reselling the cellular services of either NOCGSA or the nonwireline licensee in the New Orleans MSA. *See Cellular Communications Systems*, 86 FCC 2d 469, 510-511 (1981).

[12] Opposition of New Orleans CGSA, Inc. to Petition for Interim Joint or Third Party Operation at 5. While NOCGSA has filed applications proposing to make additions to those facilities, and thus incurring additional expense, we do not intend to act on those applications until the question of the license for the St. Tammany Parish is resolved.

[13] In the course of a broadcast proceeding to select a third party interim operator, the Commission noted recently that its experience "had raised serious questions about our procedure for selecting interim operators. Contrary to our expectations, these proceedings have consistently involved protracted delay and uncertainty." *Phoenix Media Corp.*, 2 FCC Rcd 498, 500 n.4 (1987).

[14] In response to these concerns, La Stars argues only that BellSouth Mobility, NOCGSA's parent, is engaged in joint operating agreements similar to the one La Star proposes for itself and NOCGSA. We note, however, that the Nashville/Clarksville and Lafayette/Baton Rouge systems are each under the control and operation of the same entity, i.e., BellSouth Mobility.

[15] Supplemental Opposition of NOCGSA, Inc. to La Star Application for Review, at 6 and attached Affidavit of Ray Ethridge at 3 - 4. Opposition of New Orleans CGSA, Inc. to Petition for Interim Joint or Third Party Operation at 9-11.

[16] We emphasize strongly that the concerns mentioned above are discussed solely in relation to whether we should disrupt NOCGSA's *interim* operations, and they do not reflect any views concerning selection of a permanent licensee.

[17] The Bureau's September 28, 1987 public notice indicated that section 22.916 would not apply to the instant proceeding. We have considered this question further on our own motion and have decided that, if both applicants are deemed qualified, the expedited hearing provision in section 22.916(b) should govern. If selection between the two applicants is necessary, a random selection procedure will not be used because this case presents unique licensing issues. In particular, this case may be affected by our recent policy decision that all cellular licensees should be afforded a five year period within which to adjust the size of their systems within their MSAs. *See Second Report and Order*, CC Docket No. 85-388, 2 FCC Rcd 2306 (1987).

[18] If a comparative hearing is necessary, the Commission will not consider NOCGSA's financial investment and prior period of service to the area in dispute when selecting a licensee.

[19] We recognize that, in a context where the interim operator was a disqualified renewal applicant, who was operating the station in a "trustee" capacity during the pendency of its court appeal, the Commission took a somewhat different view and concluded that profits should be impounded and distributed to the regular interim operator. *See Impoundment of Profits of Station WLBT (TV), Jackson, Miss.*, 39 FCC 2d 462 (1973). The circumstances that existed in that case are not present here.

[20] In *Newark Radio Broadcasting Ass'n v. FCC*, 763 F.2d 450 (D.C. Cir. 1985), the court recently confirmed the principle that full hearings need not necessarily be held in interim licensing proceedings. *Id.* at 454. However, none of the interim applicants in that case was an applicant for the regular license, and the court's holding expressly did not extend to those circumstances. *Id.* at 457. Accordingly, our holding here relies primarily on the court's earlier decisions in *Community Broadcasting* and especially *Consolidated Nine*, both of which concerned interim applicants who were also applicants for the regular license.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re request of

McCAW CELLULAR
COMMUNICATIONS INC.

Concerning compliance with Section 310 (b)(4) of the Communications Act (alien ownership) with regard to an investment in McCaw by British Telecom

In re application of

McCAW RCC COMMUNICATIONS INC. File No. 23333-CD-TC-1-89 *et al.*

For *pro forma* transfer of control of Affiliated Publications, Inc.

MEMORANDUM OPINION AND ORDER

Adopted: March 29, 1989; Released: April 4, 1989

By the Chief, Common Carrier Bureau:

1. On January 26, 1989 McCaw Cellular Communications, Inc. (McCaw) and British Telecom USA Holdings, Inc. (British Telecom USA) filed a letter, together with supporting information, concerning a proposed investment by British Telecom USA in McCaw. They requested confirmation from the Commission that the planned investment is consistent with Section 310 (b)(4) of the Communications Act (alien ownership) and with Commission rules. The parties also requested confirmation that prior approval by the Commission is not required because the transaction between British Telecom USA/McCaw does not involve a transfer of control. By public notice released on February 2, 1989 the Commission announced the filing and established a comment period. *See* Report No. CL-89-79 (February 2, 1989). On February 27, 1989 McCaw also filed transfer of control applications (*pro forma*) for the restructuring of Affiliated Publications, Inc. (Affiliated) interests in McCaw. Comments were filed by LIN Broadcasting Corp. (LIN).

I. BACKGROUND

A. Description of McCaw

2. McCaw is a domestic corporation which owns subsidiaries which in turn hold interests in cellular, paging and other radio authorizations. It is a leading provider of cellular telecommunications services. The McCaw family and certain members of McCaw management collectively hold 41% equity interest in McCaw. The family members holding ownership interests are Messrs. Craig O. McCaw, John E. McCaw, Jr., Keith W. McCaw, and Bruce R. McCaw (all brothers), Mrs. Scott (their mother), two trusts whose beneficiaries are the daughters of John McCaw, and a family foundation.[1] Craig McCaw is Chairman of the Board and Chief Executive Officer of McCaw. Affiliated[2] holds 47.1% equity interest in McCaw. Approximately 11.9% of the equity is held by public shareholders. The McCaw brothers, management, and Affiliated hold primarily Class B common stock, which entitles them to ten votes for every share of stock held. The public shareholders own Class A stock, which is entitled to one vote per share. The McCaw brothers and management collectively hold 46.24% of the voting power. Affiliated is entitled to 52.02% of the voting power limited by the shareholders' agreement described in paragraph 3, *infra*. The public shareholders have 1.74% of the voting power.

3. The McCaw brothers are parties to a shareholders' agreement which provides that the McCaw brothers, any family trusts, and the family foundation will vote their stock in the manner specified by Craig McCaw. Affiliated is also a party to the same shareholders' agreement. Under the shareholders' agreement, Affiliated votes that portion of its shares necessary to achieve majority approval of a given matter, pursuant to Craig McCaw's written instructions, with the following exceptions. First, Affiliated must give prior written consent to the issuance of new Class B stock or the issuance of a block of Class A stock in excess of 25% of the total number of shares issued and outstanding to less than 50 persons. Second, Affiliated is granted certain rights in connection with a sale of McCaw which entitle it to receive a fair price for its shares or to buy out the interests of the McCaw brothers.

4. McCaw's current board of directors has 13 members. Pursuant to the shareholders' agreement, Affiliated is entitled to designate four directors. Seven of the directors are selected by Craig McCaw. Two of the directors (who are to be independent of McCaw, or Affiliated or their officers or directors) are selected by a nominating committee consisting of Craig McCaw and a representative of Affiliated.

B. Description of Affiliated

5. Affiliated is a widely held, publicly traded corporation. The principal business of Affiliated is newspaper publishing. In addition, through its investment in McCaw, Affiliated is in the cellular business. Major shareholders include the Jordan and the Taylor Voting Trusts which together hold approximately 48% of Affiliated's outstanding stock.[3]

C. Description of British Telecom

6. British Telecom USA is a Delaware corporation. It is a wholly-owned subsidiary of British Telecom. British Telecom is a principal provider of domestic and international telecommunications services and equipment in the United Kingdom. British Telecom is a publicly held corporation established under the laws of the United Kingdom. Over 51% of British Telecom shares are held by the public generally. The rest of the shares are held by the British government. The British government appoints two of the sixteen members of the board of directors and has formally and publicly announced its intention not to intervene in the commercial decisions of the company. The British government has also announced that it does not expect to vote its stock on resolutions at general meetings, and has not done so in the past, although it reserves the right to do so. The British government has

indicated its policy to sell its shareholdings in British Telecom as circumstances and market conditions permit. *See* Letter from HM Government to Chairman of British Telecom (November 16, 1984), attached to McCaw's January 26, 1989 request. Moreover, the British government may not increase its shareholdings in British Telecom without special legislation.

D. The Agreement Between McCaw and British Telecom USA

7. On January 19, 1989 McCaw and British Telecom USA entered into a purchase agreement pursuant to which British Telecom USA will purchase approximately 22% of McCaw's outstanding common stock. Under the agreement British Telecom USA will buy approximately 37 million newly issued shares of McCaw stock for $41.50 per share, for a total value of $1.5 billion. British Telecom USA will purchase, subject to certain conditions specified in the agreement, a combination of class A stock (one vote per share) and class B stock (ten votes per share) so that its equity and voting rights will each equal approximately 22% of McCaw's outstanding common stock.

8. The agreement requires McCaw to expand its board of directors to nineteen members. In addition, the agreement allows British Telecom USA to designate up to four of nineteen McCaw board members. McCaw will nominate ten of the directors, all of whom must be U. S. citizens (the "Majority Directors"). Affiliated will nominate two members of the board of directors (who must also be U. S. citizens). The remaining three directors will be independent directors designated by Craig McCaw. The independent directors, according to the agreement, must be U. S. citizens and have no family, business or other relationship with any of the officers, directors or shareholders holding more than one percent of McCaw's stock or any other relationships compromising their independence.

9. The purchase agreement also establishes super-majority board voting provisions to safeguard investor interests. Thus, all actions of the board of directors require approval of a majority of the board; and, either a majority of the three independent directors or a majority of the directors other than the ten Majority Directors (those nominated by British Telecom USA and Affiliated). However, a simple majority of the board is all that is necessary to take action with respect to the following excepted matters:

a) swaps of cellular assets with other companies;

b) certain acquisitions of cellular assets (including the ability to obtain related financing); and

c) certain mergers or consolidations of McCaw with another company or a sale of all or substantially all of McCaw's assets.

10. In addition, the agreement affords British Telecom USA certain approval rights to safeguard its interests. For instance, British Telecom USA must give its prior consent before the board can approve or the company can engage in the action to the following matters:

a) amendments to McCaw's by-laws or articles of incorporation which would impair British Telecom USA's rights under the agreement;

b) certain issuances of new equity or stock in an amount greater than 10% of the outstanding shares of McCaw in a given year, plus 50% of any authorized but unissued shares from the previous year[4] (under current conditions this would allow McCaw to issue more than $425 million in stock without British Telecom USA's prior approval);

c) the issuance of new shares of super-voting rights stock;

d) the issuance of preferred stock with disproportionate voting rights;

e) entry of McCaw into non-telecommunications-related businesses or the United Kingdom market;

f) the sale, transfer or other disposition in any year of certain large blocks of cellular or non-cellular assets; *i.e*, cellular assets in excess of 15% or more of the aggregate "pops" in which McCaw has an interest, and non-cellular assets, in excess of 15% or more of the fair market value of McCaw's total assets.

E. Contentions of McCaw and British Telecom USA

11. McCaw and British Telecom USA contend that the planned changes in the McCaw board of director's composition and voting procedures do not involve a transfer of control requiring prior Commission approval. They contend that the investor safeguard provisions are similar to provisions previously accepted by the Commission as reasonable to protect minority interests. McCaw and British Telecom USA maintain that the safeguards will not impede McCaw's ability to finance, operate or manage its subsidiaries holding interests in radio authorizations. In addition, British Telecom USA and McCaw maintain that Craig O. McCaw will retain control of the company at all times, as evidenced by the following:

a) Craig McCaw will continue to vote (pursuant to shareholders' agreements) more than 50% of the company's stock.

b) Craig McCaw will continue to designate a majority of the board of directors (10 out of 19).

c) Craig McCaw will designate three other directors who are independent of McCaw, British Telecom USA, any one percent or greater shareholder, or any associate thereof.

d) Craig McCaw will continue to manage the company and its subsidiaries with no changes in their officers or employees.

e) Craig McCaw has the right to buy out or require British Telecom USA to sell its interests in the company if significant board disputes arise four times in a given year.

12. Moreover, McCaw and British Telecom USA state, that in order to ensure compliance with the alien ownership provisions[5] in the Communications Act the purchase agreement contains three key features. First, the agreement provides that alien ownership in McCaw by British Telecom USA and others will not exceed the limits established in the Communications Act. Second, McCaw has the right under its articles and the agreement to redeem stock held of record or voted by non-U.S. citizens to ensure compliance with Section 310 (b)(4). Finally,

McCaw and British Telecom USA set forth that the agreement requires periodic surveying of alien ownership under procedures acceptable to the Commission to identify and monitor the aggregate total of stock owned of record or voted by non-U.S. investors.

F. McCaw's and Affiliated's Plan of Reorganization

13. On January 18, 1989, McCaw and Affiliated announced a proposed restructuring of Affiliated's interests in McCaw. On February 27, 1989 McCaw filed *pro forma* transfer of control applications dealing with this transaction. In the restructuring, the McCaw stock held by Affiliated will be distributed to Affiliated' shareholders as part of a tax-free distribution of its assets. Specifically, in the restructuring, shares of a new holding company owning Affiliated's principal subsidiaries (Globe Newpaper Company and Billboard Publications, Inc.) will be distributed to Affiliated's shareholders in a tax-free spin-off, and Affiliated then will merge with McCaw. In connection with the merger, Affiliated' shareholders, including the Jordan and Taylor voting trusts, will exchange their shares of Affiliated stock for a total of 58,522,638 shares of McCaw's Class A common stock. Shares of McCaw Class B stock currently held by Affiliated will be retired. The restructuring is subject to several conditions, including receipt of a favorable ruling from the Internal Revenue Service that Affiliated's proposed restructuring would be a tax-free distribution of its assets and approval by Affiliated's and McCaw's shareholders.

14. McCaw and Affiliated intend to proceed with this restructuring independently of the planned investment in McCaw by British Telecom USA. In the event that the Affiliated restructuring occurs before the British Telecom USA investment, the effect would be as follows. The McCaw family and management will hold, directly and in their own right, approximately 42.18% of the equity of McCaw and 87.3% of the voting power of the company. The Jordan and Taylor Voting Trusts will hold, directly and in their own right, approximately 21.37% of the equity and 4.43% of the voting power. The public (including existing public shareholders, as well as the former shareholders of Affiliated other than the Jordan and Taylor Voting Trusts) will hold 36.45% of the equity and 8.28% of the voting power.[6]

15. Moreover, McCaw additionally and in the alternative describes the ownership of McCaw in the event that the Affiliated restructuring occurs concurrently with or subsequent to the British Telecom USA investment. The McCaw family and management will hold, directly and in their own right, approximately 32.73% of McCaw's equity and 67.74% of the voting power. The Jordan and Taylor Voting Trusts will hold approximately 16.58% of the equity and 3.43% of the voting power. The public will hold 28.29% of the equity and 6.42% of the voting power. In addition, British Telecom USA will hold 22.4% of the equity of McCaw and 22.4% of the voting power.

16. It is contemplated that with the restructuring of Affiliated, the existing shareholders' agreement will be amended to eliminate Affiliated as a party and to add British Telecom USA and the Jordan and Taylor Voting Trusts as parties to the shareholders' agreement. In addition, the shareholders' agreement will be amended to provide British Telecom USA and the two trusts with rights (previously described) intended to protect their relative investments in the company. In this regard, each of the Jordan and Taylor Voting Trusts will be entitled to nominate one director. Under the revised shareholders' agreement, Craig McCaw will continue to be entitled to vote all shares of company stock owned beneficially by the McCaw family and management. These shares alone will give Craig McCaw approximately 67.75% voting power. In addition, each of the voting trusts will be required to vote its shares of the Company's stock as directed by Craig McCaw, thus giving him control of 71.17% of the voting power of the company.

G. Contentions of McCaw

17. In the transfer of control applications McCaw argues that it does not believe that prior approval by the Commission is required because the restructuring will not result in any change in the ultimate control of McCaw. Such control will remain with Craig McCaw. However, McCaw argues that if prior approval is required it is clear that the transaction is *pro forma* in nature and it requests that the applications be processed on this basis.

18. McCaw also requested a waiver of the requirements in FCC Form 490 which direct applicants to file copies of each authorization and associated Form 489 notifications for the facilities to be transferred and assigned. The waiver is requested because compliance with this requirement would result in the submission of hundreds of pages of authorization materials already maintained in the Commission's records. This, McCaw maintains, would appear to impose an unnecessary burden on the Commission's staff, especially since the applications involve a *pro forma* transfer. McCaw also requests pursuant to Section 22.23(g)(3) of the rules, a blanket exemption, from the major amendment provisions, in cases where McCaw companies file amendments to pending applications to reflect the consummation of the *pro forma* transfer of control. The exemption is requested so that the pending applications, as amended, will not be placed on public notice and treated as newly filed for purposes of processing and comparative consideration. McCaw also requests that the grant of the transfer applications include authority to effect the restructuring with respect to any applications granted between the filing of the transfer applications and the date on which the restructuring can be completed.

II. COMMENTS

A. LIN's Comments

19. On February 17, 1989, LIN filed a letter commenting on the above cited transactions. According to LIN, McCaw is the single largest stockholder (9.8%) in LIN.[7] LIN maintains that the British Telecom USA transaction will decrease the voting power of Affiliated to well below a majority (from above 50% to below 50%) which requires prior Commission approval. In addition, LIN states that the determination of whether Affiliated has ceded voting control to the McCaw brothers cannot be undertaken because this requires Commission review of a new shareholder's agreement, which is not before the Commission.[8] LIN further argues that there is substantial, albeit limited, information available to conclude that a transfer of control application should be filed because Affiliated's alleged negative control rights will be drastically affected by the British Telecom USA transaction. According to LIN, Affiliated currently exercises a substantial degree of control over major corporate transactions. The British

Telecom USA stock purchase agreement eliminates this control and instead appears to permit the McCaw family to engage in major corporate transactions without Affiliated's consent. Given the prospective fragmentation of current control and ownership in McCaw (especially if Affiliated ceases to be a stockholder as the result of the proposed merger with McCaw), given the prospect of British Telecom USA's substantial ownership and alleged negative-control powers, and given British Telecom USA's foreign ownership, the Commission should undertake a review of the proposals pursuant to a transfer-of-control application, according to LIN.

20. In its comments LIN also asserts that the McCaw-Affiliated merger must be considered at this time. LIN disputes the assertions of McCaw and British Telecom USA that the two transactions are independent. According to LIN, the two transactions are certainly coordinated and the cross references contained in the stock purchase agreement make that clear. In additional comments filed on March 15, 1989 LIN submits that if the Commission grants the *pro forma* applications relating to the Affiliated reorganization, it should condition the grant to provide that the Affiliated reorganization be consummated only if (a) the British Telecom USA transaction is not consummated or (b) the consummation of the British Telecom USA transaction be subject to review pursuant to a transfer of control application.

21. Based on the current record, LIN states that it has no definitive view at this time on whether the proposed British Telecom USA transaction is consistent with applicable alien-ownership restrictions. LIN further maintains that the Commission must review carefully the restrictions placed on McCaw pursuant to the stock purchase agreement which give British Telecom USA negative control powers and may give it more influence than its 22% stock ownership interest would normally entail. In its additional comments filed on March 7, 1989, LIN further maintains, that the Commission should not treat British Telecom USA as a passive minority investor with typical rights and powers. According to LIN, the Commission must determine (1) whether the exceptional powers that McCaw is prepared to confer on a foreign entity are consistent with the requirements of the Act and the rules, and (2) whether British Telecom USA's proposed ownership in McCaw, coupled with those exceptional powers and the restrictive covenants entered into by the parties, is consistent with the public interest.

22. In addition, LIN maintains that the Commission must look at non-competition clauses in the agreement as relevant to a public interest determination. The British government's 48% stock ownership interest in British Telecom should also be considered. No other shareholder owns more than 15% of British Telecom stock or is permitted to do so. If the British government chooses to vote its stock in British Telecom it would control British Telecom, LIN maintains. The potential role of the British government is relevant to the rumored rationale for the British Telecom USA investment in McCaw -- to finance a hostile take-over of LIN. Using the resources of an alien company, capable of being controlled by a foreign government, to finance an unfriendly take-over of an American licensee raises serious public-interest questions, according to LIN.

B. McCaw's Comments

23. In its comments McCaw notes that LIN's participation in this matter appears to be motivated by its speculation about McCaw's future business plans, rather than by public interest concerns. According to McCaw, LIN does not actually oppose the British Telecom USA investment *per se*, but seeks to interpose a variety of procedural or informational barriers to prompt Commission action. Therefore, McCaw requests that LIN's arguments be summarily rejected.

24. McCaw reiterates that the British Telecom USA investment in McCaw does not necessitate the filing of any application for transfer of control, since no transfer of control is involved (no one is gaining or losing control).[9] The British Telecom USA investment in McCaw does not alter Craig McCaw's current control of the company, McCaw maintains. After the British Telecom USA transaction, McCaw affirms, Craig McCaw will continue to hold the legal right to vote or to direct the vote of a majority of the corporation's shares. Moreover, according to McCaw, the changes in Affiliated's rights associated with the British Telecom USA investment do not involve matters giving rise to control within the meaning of Section 310 of the Act. Ownership and control of McCaw is neither unclear nor fragmented and at all times Craig McCaw will continue to exercise control of the company, McCaw maintains.

25. In addition, McCaw asserts that the Affiliated reorganization is irrelevant to the McCaw/British Telecom USA request. According to McCaw, the request and the purchase agreement disclosed all facts material to the British Telecom USA purchase. The purchase agreement contains a complete description of all material provisions to be included in the relevant shareholders' agreement. Moreover, the British Telecom USA transaction, McCaw asserts, will close irrespective of the Affiliated restructuring. Therefore, McCaw argues that the Commission need not evaluate the Affiliated restructuring when it considers the British Telecom USA transaction.

26. In addition, to the extent that LIN complains about the lack of specific details concerning the Affiliated restructuring, McCaw notes that it filed *pro forma* transfer of control applications and all the details are now before the Commission. McCaw also maintains that there is no basis for LIN's suggestion that the Affiliated restructuring may require a transfer of control application. At most, only a *pro forma* transfer of control is involved in the reorganization. According to McCaw, the applications were filed to inform the Commission of the fact that the basis of Craig McCaw's control of the company will change with the Affiliated transaction. His control currently stems from his ability to direct the vote of that portion of Affiliated shares necessary to form a majority when combined with the McCaw family shares, which he also votes. After the Affiliated restructuring, Craig will vote the stock owned by himself, his brothers, the family foundation, and family trusts -- his control will not depend upon the voting rights of Affiliated's successors or British Telecom USA, McCaw affirms.

27. McCaw maintains that LIN's call for unspecified further information concerning the alien ownership aspects of the investment represents nothing more than an attempt to delay prompt Commission action. According to McCaw, the purchase agreement and the request demonstrate that there will be strict compliance with Section 310(b). Mechanisms, including regular surveys and redemption procedures are required by the purchase agree-

ment to keep alien ownership in McCaw within statutory limitations. McCaw asserts. McCaw also maintains that investor protection provisions, for the benefit of a minority shareholder such as British Telecom USA do not amount to *de facto* control. McCaw alleges that LIN has not demonstrated how the section of the purchase agreement which precludes McCaw and British Telecom USA from competing in each other's home countries might adversely affect competition or the public interest.

III. DISCUSSION

A. Proposed Acquisition By British Telecom USA

28. British Telecom USA is proposing to acquire 22.4% of the equity and voting power in McCaw. Before consummating the transaction McCaw and British Telecom USA have requested that the Commission confirm that the proposed investment is consistent with Section 310(b)(4) of the Communications Act and with Commission rules. They also requested confirmation that prior approval by the Commission is not required because the transaction does not involve a transfer of control.

29. Section 310 (b) of the Communications Act establishes certain limitations on the Commission's authority to grant radio licenses to companies with foreign ownership interests. For instance, Section 310 (b)(3) states that no broadcast or common carrier license shall be granted to or held by - any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country. Section 310(b)(4) provides that: "no broadcast or common carrier radio license shall be granted to or held by any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license."

30. By its express language, the benchmarks established in Section 310 (b)(4), rather than those contained in Section 310 (b)(3), apply in situations in which an entity directly or indirectly controls the licensee. As a consequence, the standards contained in Section 310 (b)(3) are applicable only in situations in which an entity directly holds equity or voting interests in a licensee. Under Section 310 (b)(4), aliens are permitted to hold 25% ownership or voting interests in a company which controls the licensee. Moreover, Section 310 (b)(4) does not proscribe aliens from becoming directors as long as at least 75% of the directors in a company which controls the licensee are United States citizens. *Request for Declaratory Ruling Concerning the Citizenship Requirements of Section 310 (b) (3) and (4) of the Communications Act of 1934, as amended, (Wilner & Scheiner)*, 103 FCC 2d 511, 516-17 (1985), 58 Rad Reg 2d (P&F) 531, 539-41.

31. The proposed acquisition in McCaw by British Telecom USA falls under section 310 (b)(4) of the Communications Act because McCaw itself does not hold licenses, but rather it controls the licensees through wholly owned subsidiaries. We have reviewed the proposed acquisition by British Telecom USA and we find that it is consistent with Section 310(b)(4) of the Communications Act and Commission Rules. The statutory restrictions of this section are intended to guard against foreign influence by curbing aliens' participation in the provision of domestic radio services. *Wilner & Scheiner*, 58 Rad Reg 2d (P&F) 531, 539-41. However, the restrictions on alien participation in companies that own or control a Commission licensee are not absolute. The Commission has the discretion under Section 310(b)(4) to refrain from applying the statutory proscriptions in a particular case if it determines that such action does not adversely affect the public interest. *Houston International Teleport Inc.*, 62 Rad. Reg. 2d (P&F) 886 (1987); *Wilner & Scheiner*, 58 Rad. Reg. 2d (P&F) at 541. However, in this case we do not have to exercise our discretionary authority under Section 310(b)(4) since the acquiring interests are well within the statutory 25% limit. British Telecom USA will be acquiring less than one fourth of the capital stock of McCaw and less than one-fourth of the directors of McCaw will be foreigners.

32. We now examine the question of whether prior Commission approval of this transaction is necessary. In essence, this question requires a determination as to whether the transaction is a transfer of control. Section 310(d) of the Communications Act provides:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience and necessity will be served thereby . . . .

If a transfer of control is involved we must then decide whether the same is substantial or not "substantial." A "substantial" transfer of control requires that we place the application on public notice and provide interested parties 30 days to contest the transfer before the Commission can act on the application. *See* Section 309(c)(2)(B) of the Communications Act and section 22.27(c)(8) of the rules. *See also* note 9, *supra*.

33. Section 22.39 of the rules provides that a change from less than 50% ownership to 50% or more ownership shall always be considered a transfer of control.

> The test for whether the interest to be transferred is a "controlling one" or "substantial" has generally been (a) whether 50% or more of the stock is being transferred, and (b) whether as a result of the transaction 50% or more of the outstanding stock will be held by persons whose qualifications to be Commission licensees have not previously been approved of or "passed upon". *Barnes Enterprises, Inc.*, 55 FCC 2d 721 (1975). Generally, any transfer which involves the movement of 50% or more of a licensee's stock, whether to persons passed upon or not, has required the filing of a "long form" application. As an exception to this general requirement, the Commission has allowed a short form to be used when

> the transaction involves a stock transfer whereby an existing stockholder with negative (50%) control assumes positive control by acquiring all of the remaining stock. *Metromedia, Inc.*, 98 FCC 2d 299 at 307, (1984) citing *Barnes, supra* at 725, n.4. In certain cases, however, "control" is not limited to negative control (ownership of 50% of the corporation's stock) or *de jure* control (ownership of over 50% of the corporation's stock), but can include situations of control "in fact" (*de facto* control), regardless of the amount of stock owned.

Metromedia, 98 FCC 2d at 306.

34. The Commission has recognized that determining which party has "control" of a company may involve an issue of fact which must be resolved by the special circumstances presented. *Metromedia*, 98 FCC 2d at 306. Given the widely varying fact patterns that arise in the business world, there is no precise formula by which all factors can be evaluated when confronted with question of transfer of control. *News International, PLC*, 97 FCC 2d 349, 355 (1984). A realistic definition of the word control includes any act which vests in a new entity or individual the right to determine the manner or means of operating the licensee and determining the policy that the licensee will pursue. *News International*, 97 FCC 2d at 355 (citing *WHDH, Inc.*, 17 FCC 2d 856, 863 (1969)). Thus, the facts of a particular situation (*e.g.*, who has the power to direct the company's operations, who determines the make-up of the Board of Directors), are relevant to determining who has control of the company. *Metromedia*, 98 FCC 2d at 306. The question of whether a minority investor may be in actual control of the company is governed chiefly by the demonstration of the power of the minority investor to dominate the management of corporate affairs. *See, News International*, 97 FCC 2d at 355 (citing *Benjamin L. Dubb*, 16 FCC 274 (1951)). A minority shareholder will not be viewed as in control of a company unless its influence is so great that it is able to determine the licensee's policies and method of operation or dominate corporate affairs. *Id.* at 356. With these general guidelines before us we now turn to the facts of this case.

35. British Telecom USA will be acquiring 22.4% of the equity and voting power in McCaw. This is less than a 50% interest. As a result of its equity contribution British Telecom USA will elect four directors out of 19, or 21% of the board of directors. However, Craig McCaw will retain majority control, in terms of electing a majority of the board of directors (10 out of 19 or 53%) and 71.17% of the voting power (once the Affiliated restructuring occurs or over 50% if the Affiliated restructuring does not occur). McCaw also asserts that Craig McCaw will continue to exercise that control and British Telecom USA denies any intention to control the officer's of McCaw. Thus, we find that British Telecom USA's mere acquisition of the minority interest does not constitute a transfer of control by itself. *See, Id.* at 356.[10]

36. We must nonetheless review the specific terms set out in the British Telecom USA/McCaw purchase agreement to determine whether there is some additional factor which would provide British Telecom USA with the power to control McCaw, specifically, the covenants in the purchase agreement intended to protect British Telecom USA's investment in McCaw. *See* paragraph 10, *supra*. The transactions identified in the agreement which require British Telecom USA's prior consent -- *e.g.*, amendments to McCaw's by-laws, issuance of new equity, entry of McCaw into non-telecommunications-related businesses or the United Kingdom market, and the sale of assets. To the extent that British Telecom USA's prior consent is required before McCaw can undertake these actions these covenants restrict the actions of McCaw. Thus, a question arises as to whether these restrictions represent a transfer of control or whether British Telecom USA, as a minority shareholder, will have control of McCaw.

37. The Commission has previously held that covenants which give a party some power to block certain major transactions of a company by themselves do not represent the type of transfer of corporate control envisioned by Section 310(b) of the Act.

> Of particular importance are certain negative covenants Haefner (the proposed minority buyer) proposes to impose on Datran (the Commission point-to-point microwave permittee). These covenants preclude or limit Datran in undertaking various activities of a financial nature without Haefner's prior consent, e.g., selling shares of its common stock, merging with another corporation, selling or leasing its assets, purchasing stock of other corporations (other than wholly owned subsidiaries), and the making or guaranteeing of loans. The questions raised by these covenants is whether such restrictions represent a transfer of control of Datran. In *Flathead Valley Broadcasters*, 5 RR 2d 74 (Rev. Bd. 1965), it was held that restrictions of the type proposed by Haefner, for the express purpose of protecting a lender's investment, do not necessarily represent a "transfer of control" requiring Commission approval. However, in *WWIZ, Inc.*, 36 FCC 561 (1964), we also indicated that so-called investor protection restrictions when combined with investor activity in the affairs of a corporation can and often do lead to the type of control requiring our approval.

News International, 97 FCC 2d at 356 (citing *Data Transmission Co.*, 44 FCC 2d 935 at 936-37).

38. We find that the following consent matters in the British Telecom USA/McCaw agreement -- issuance of new equity, and the sale of assets -- do not constitute a transfer of control. *See Data Transmission, supra*. We also find that absent any facts tending to indicate that British Telecom USA proposes to engage in active control of the corporation,[11] these consent matters by themselves do not represent a transfer of corporate control envisioned by Section 310(b) of the Act.

39. In the past the Commission has also found that minority shareholder's right to block any change in a company's charter or by-laws did not constitute a transfer of control. *News International*, 97 FCC 2d at 357-58. Likewise, the covenant requiring prior consent before McCaw can amend its by-laws or articles of incorporation is designed to safeguard British Telecom USA's investment by preventing the dilution of its stock holdings. It has not been alleged that the current by-laws set policy for the day-to-day operation of McCaw. Moreover, we find that there is nothing to indicate that through amendments to

the by-laws British Telecom USA will be able to set McCaw's policies as to finances or personnel policy or control McCaw. *See News International, Id.* at 357-58.

40. The prohibition against engaging in non-telecommunications-related businesses does not grant control of McCaw. *See News International, Id.* at 357. It appears that this covenant has been included in the purchase agreement to protect British Telecom USA's investment in McCaw. Moreover, McCaw may engage in non-telecommunications-related businesses if British Telecom USA grants its consent, which may not unreasonably be withheld.

41. We note that the covenant that McCaw may not compete with British Telecom in the United Kingdom market without British Telecom USA's permission is not a typical covenant not to compete. Usually such prohibitions are absolute. Generally, the Commission will approve a covenant not to compete only if it is reasonable and is limited in geographic effect and duration. *See Intercontinental Radio Inc.*, 56 Rad. Reg. 2d (P&F) 1565, 1567 (1985) (covenants not to compete have been approved in connection with the sale of stations, where the agreement is reasonably limited in duration and geographic extent); *Seven Hills Television Co.*, 64 Rad. Reg. 2d (P&F) 274 (Rev. Bd. 1988) at 305 (covenants not to compete must be limited in scope). It is clear that this non-competition clause will have no impact in the United States domestic market. The effects internationally are not clear.[12] Although we would have some concern were such a noncompetition covenant entered into between domestic service providers, we believe this provision to be so minor in the overall context of the British Telecom USA/McCaw transaction that it is insufficient to persuade us to take any further action.

42. We have examined both of these covenants under the antitrust component of the public interest standard as requested by LIN. *FCC v. RCA Communications, Inc.*, 346 U. S. 86 (1953) (competition is a factor to be weighed in determining where the public interest lies). We conclude that the overall public interest benefits from the British Telecom USA/McCaw venture outweigh any possible anticompetitive effects from it - even assuming that these effects could be established.[13] *See United States of America v. Federal Communications Commission (Satellite Business Systems)*, 652 F. 2d 72 (1980). The sharing of British Telecom USA's technical and commercial expertise with McCaw will be beneficial for the industry. We additionally find that the British Telecom USA investment will strengthen the financial resources of McCaw which will support deployment, enhancement and expansion of cellular services to the public. Moreover, McCaw will benefit from British Telecom USA's substantial experience, expertise and knowledge gained from British Telecom's participation in the cellular marketplace. In addition, the public will benefit by enhanced competition in domestic services markets. In the cellular services we will continue to have two providers in each market including the presence of strong non-wireline carriers such as McCaw, to compete with wireline carriers. In the public land mobile services there are other major carriers besides McCaw, and other smaller carriers providing paging and two way communications services. Therefore, we find that the public interest will be served by the McCaw/British Telecom USA transaction.

43. We agree with McCaw that the British Telecom USA transaction is consistent with Section 310(b)(4) of the Act and Commission Rules and that prior approval is not required. British Telecom USA can block certain major transactions that McCaw might wish to effectuate, but this power appears to be designed primarily to protect British Telecom USA's investment. British Telecom USA cannot compel McCaw to make major transactions. In addition, British Telecom USA is limited by the purchase agreement to appointing only 4 members to the Board of Directors. Craig McCaw will retain majority voting power and select a majority of the Board of Directors. Therefore, McCaw will always have control. There is nothing in the record to indicate that McCaw's personnel practices or finances will be controlled in any way by British Telecom USA. Thus, we find that the purchase agreement between British Telecom USA and McCaw does not grant British Telecom USA the right to determine the policy that McCaw will pursue, or indicate that British Telecom USA will dominate the management of corporate affairs. Consequently, we find that the transaction does not constitute a transfer of control and therefore, no prior Commission approval is required. Accordingly, the parties did not have to file transfer of control applications.

44. The British Telecom USA and McCaw purchase agreement also provides a mechanism for compliance with section 310 (b)(4) of the Act. The agreement provides redemption procedures and regular surveys to keep alien ownership in McCaw within the requirements of the Communications Act. Finally, we find that the British government's investment in British Telecom does not raise additional questions under Section 310(b)(4) of the Act. Under this section a foreign government can acquire interests up to the limits established therein.

B. McCaw's and Affiliated's Agreement

45. We find that the Affiliated transaction is independent of the British Telecom USA transaction. However, we also find it is in the public interest and efficient to reach a decision on the Affiliated transaction at this time because the comments filed concerning the British Telecom USA transaction were based on objections to the Affiliated transaction. Additionally, we find that even if the Affiliated transaction takes place before the British Telecom USA transaction, control would still remain with Craig McCaw, and therefore, the effects of the Affiliated transaction do not negatively impact the British Telecom USA transaction (McCaw family and management would hold 42.18% of McCaw's equity and 87.3% of the voting power).

46. We disagree with LIN that the distribution of McCaw stock held by Affiliated is a substantial transfer of control. The McCaw family currently collectively hold a 41.21% equity interest in McCaw. Craig McCaw and management collectively hold 46.24% of the voting power. Affiliated holds 47.71% of the equity and 52.02% of the voting power subject to a shareholders' agreement. The shareholders' agreement requires that Affiliated vote that portion of its shares necessary to achieve majority approval of a given matter pursuant to Craig McCaw's written instructions. Craig McCaw also votes his family's shares. Therefore, Craig McCaw will always be able to command a 51% vote concerning the operation and every day corporate actions of McCaw. Thus, Craig McCaw had control before the transaction and will continue to have control after the transaction.

47. If the reorganization occurs before the British Telecom USA transaction the McCaw family and management would hold 42.18% of the equity of McCaw and 87.3% of the voting power of the company.[14] With the new shareholders' agreement Craig McCaw will vote his family's and management stocks which will give him approximately 84% voting power. In addition, each of the voting trusts will be required to vote its shares of the stock pursuant to Craig McCaw's direction, which would give him the power to control 91.73% of the voting power of the company.[15]

48. Under these circumstances we conclude that Craig McCaw will continue to have control of McCaw. He currently has 46.24% of the voting power. Affiliated votes its stock in accordance with Craig McCaw's directions, an arrangement the Commission has previously approved. Craig McCaw nominates a majority of the board of directors and he manages the company. For purposes of Section 310 (b) we focus on changes in the ownership of voting power. *See Grace Missionary Baptist Church*, 80 FCC 2d 330, 336-37 (1980). Under these circumstances this change in voting ownership is not substantial, and we find that no transfer of control applications were needed to be filed. We have previously passed on the qualifications of the McCaw family and find nothing in this record to require us to deviate from our prior approval.[16] Accordingly, the *pro forma* transfer of control applications filed by McCaw are being dismissed as unnecessary.

IV. ORDERING CLAUSES

49. Accordingly, IT IS ORDERED, that prior approval is not required before the British Telecom USA investment in McCaw can take place because the transaction does not involve a transfer of control. We also confirm that the investment is consistent with Section 310(b)(4) of the Communications Act.

50. IT IS FURTHER ORDERED, that the *pro forma* transfer of control applications filed by McCaw Cellular Communications, Inc., File No. 23333-CD-TC-1-89 *et al.* ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] The vast majority of the family stock is held by the four McCaw brothers.

[2] *See* description of Affiliated in paragraph 5, *infra*.

[3] Additional stockholders of Affiliated who own 5% or more of its voting stock are: William O. Taylor and Boston Safe Deposit and Trust Company.

[4] This is designed to protect against dilution of British Telecom USA's equity interests or voting rights.

[5] Section 310(b)(4) of the Communications Act. *See* paragraph 29, *infra*.

[6] The percentages do not add up to 100% due to rounding.

[7] The proposed British Telecom USA involvement in McCaw will have indirect effects on LIN as a result of McCaw's ownership of LIN stock. Thus, LIN has an interest in ensuring that the British Telecom USA involvement takes place in conformity with the Communications Act and the Commission's rules, it asserts. According to LIN, it has a further interest in ensuring that if the British Telecom USA transaction is a preliminary step in a grand takeover scheme directed at LIN, the Commission is able to scrutinize it with scrupulous care and fairness.

[8] In additional comments filed on March 7, 1989 in response to McCaw's and British Telecom USA's comments, LIN requests that the Commission require McCaw to file the new shareholder's agreement.

[9] The parties refer to long-form and short-form applications. This terminology is used when applying for a mass media license. Section 73.3540 of the Commission rules, authorizes the use of a short form and implements section 309(c)(2)(B) of the Communications Act, which exempts an assignment or transfer which does not involve a substantial change of ownership or control from the 30 days statutory waiting period and from petitions to deny. *See, Metromedia, Inc.*, 98 FCC 2d 300 (1984). In the public land mobile services we do not have a short-form. However, there are rule provisions implementing section 309(c)(2)(B) of the Communications Act which exempt from the public notice requirements, 30 days statutory waiting period and from petitions to deny, assignments or transfer of control which do not involve a substantial change in ownership or control. *See* Section 22.27(c)(8). These applications are normally referred to as *pro forma* transfer of control applications.

[10] At the time of the issuance of new equity for British Telecom USA's purchase, Affiliated and McCaw's equity interests will be diluted. However, by virtue of the shareholders agreement, control of the company will remain with Craig McCaw. We agree with McCaw that Affiliated does not currently have control of the company. We also agree with McCaw that the rights Affiliated possesses to limit certain corporate actions are only safeguards to protect its investment in the company; these are typical contract terms for large minority shareholders, and do not vest control or "negative control" on Affiliated, as LIN claims.

[11] British Telecom USA has asserted that it has no intention to exercise control of McCaw.

[12] McCaw and British Telecom USA pointed out that the United Kingdom does not generally restrict alien ownership in telecommunications licensees (including British Telecom) and that United States companies are active participants in the British telecommunications marketplace today.

[13] The Commission's overriding responsibility is not to foster the maximum level of competition in the industry it oversees, but to promote the public interest. *See FCC v. RCA Communication, Inc., supra*, 346 U.S. 86 (1953).

[14] The Jordan and Taylor Trusts would hold 21.37% of the equity and 4.43% of the voting power. Members of the public will hold 36.45% of the equity and 8.28% of the voting power.

[15] There is no indication that Craig McCaw's power to vote the stock will be diminished after the British Telecom USA/McCaw and the Affiliated transactions take place.

[16] We disagree with LIN that we require the filing of the new shareholders agreement prior to our decision in this case. We understand that the agreement is in the process of being drafted. We are making our ruling based on the facts before us as represented by the parties. However, we will require that the parties file the final signed agreement before the Commission. If

a new shareholders agreement is not reached, the parties will need to take whatever action before the Commission that is required by the Act and our rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-313

In the Matter of

Amendment of Section 73.202(b), RM-6375
Table of Allotments,
FM Broadcast Stations.
(Eagle River, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 10, 1989; Released: April 25, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 4119 (1988), issued at the request of Nicolet Broadcasting Inc. (petitioner), licensee of Station WRJO(FM), Channel 232A, Eagle River, Wisconsin, proposing the substitution of Channel 233C2 for Channel 232A at Eagle River. The *Notice* also proposed the modification of the license for Station WRJO(FM) to specify operation on the higher powered adjacent channel. Petitioner filed supporting comments reiterating its intention to construct the expanded FM service. No other comments were accepted.[1]

2. We believe the public interest could be served by the substitution of Channel 233C2 for Channel 232A at Eagle River, as that community's first wide coverage area FM station. The channel substitution can be made consistent with the Commission's minimum distance separation requirements with a site restriction of 18.9 kilometers (11.7 miles) north of Eagle River.[2] The restriction is necessary in order to avoid a short spacing to vacant but applied for Channel 234C2 at Mosinee, Wisconsin. [3] Petitioner indicates its willingness to relocate its current transmitter site.

3. As requested, we are herein modifying the license of Station WRJO(FM) to specify operation on Channel 233C2, in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 9, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Eagle River, Wisconsin	233C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Nicolet Broadcasting Inc., for Station WRJO(FM), IS MODIFIED, to specify operation on Channel 233C2 in lieu of Channel 232A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Russell Crass (Crass), Chief Engineer of Station WAOW(TV-9), Wausau, Wisconsin, filed comments objecting to the proposed upgrade at Eagle River. Crass claims that the proposed changes at Eagle River could create reception problems for Channel 9. He urges the petitioner to take whatever measures necessary to eliminate any problems that may occur. Based on an examination of the Crass comments, we find no valid basis for concluding that objectionable interference would occur from the proposed upgrade. *See* Sections 73.209 and 73.612 concerning protection from interference accorded to FM and TV broadcast stations. We also note that Crass' comments failed to include a certificate of service indicating compliance with Section 1.420(a) and (c) of the Commission's Rules. Although Crass indicates a copy of his comments was sent to Station WRJO(FM), there is no indication that WRJO(FM)'s counsel, as listed in the *Notice*, was also served.

[2] The restricted site coordinates are 46-05-00 and 89-11-47.

[3] We note that the *Notice*, provided an incorrect citation for the then pending proceeding for Mosinee, Wisconsin

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-398

In the Matter of

Amendment of Section 73.202(b), RM-5956
Table of Allotments,
FM Broadcast Stations.
(Farwell, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 10, 1989; Released: April 25, 1989

By the Chief, Allocations Branch:

1. At the request of Dominion Communications, Inc. (petitioner), licensee of Station KLZK-FM, Channel 252A, Farwell, Texas, the Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 5966 (1987), proposing the substitution of Channel 252C2 for Channel 252A at Farwell, and modification of its license to specify operation on the higher class co-channel. Petitioner filed supporting comments reaffirming an interest in pursuing the upgrade of its facilities.

2. Based on the information before us, we believe the public interest would benefit from the substitution of Channel 252C2 for Channel 252A at Farwell, since it could provide that community with enhanced FM broadcast service. The substitution can be made in compliance with the Commission's minimum separation requirements from the current transmitter site of Station KLZK-FM.[1] We stated in the *Notice* that final action in this proceeding would be delayed until Station KVOQ(FM) at Lorenzo, Texas, receives a construction permit and is licensed to operate on Channel 251C2 in lieu of Channel 252A. On March 9, 1989, Station KVOQ(FM) was granted a license to cover its construction permit for Channel 251C2 thus removing the obstacle to finalizing this proceeding. *See* BLH-880520KC.

3. In accordance with Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station KLZK-FM to specify operation on Channel 252C2.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 9, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Farwell, Texas	222C1, 252C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KLZK-FM, Farwell, Texas, IS MODIFIED, to specify operation on Channel 252C2 in lieu of Channel 252A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates are 34-24-15 and 103-02-58.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-36

In the Matter of

Amendment of Section 73.202(b),	RM-5503
Table of Allotments,	RM-5923
FM Broadcast Stations.	
(Hiawatha, Manhattan and	
Ogden,[1] Kansas)	

ORDER TO SHOW CAUSE

Adopted: April 11, 1989; Released: April 25, 1989

By the Chief, Allocations Branch:

1. The Commission issued the *Notice of Proposed Rule Making* in this proceeding, 2 FCC Rcd 1517 (1987), proposing the substitution of FM Channel 268C2 for Channel 280A at Hiawatha, Kansas, in response to a petition filed by KNZA, Inc. (KNZA). KNZA also requested modification of its license for Station KNZA-FM to specify the new channel. KNZA filed comments restating its interest in the channel. Manhattan Broadcasting Co. (Manhattan) filed comments. Manhattan also filed a counterproposal.[2] and Kaw Valley Broadcasting Co. (Kaw Valley) and Manhattan filed reply comments. [3]

2. KNZA's proposal would provide Hiawatha with its first wide coverage area channel. Channel 268C2 can be allotted to Hiawatha in compliance with the spacing requirements provided there is a site restriction 12 kilometers (7.4 miles) east of the community to avoid a short spacing to Station KEZH, Channel 268C2, Hastings, Nebraska.

3. Manhattan's interest in this proceeding arose through a more circuitous route. Manhattan first filed a petition for rule making on April 3, 1985 requesting the substitution of Channel 284C2 for Channel 269A at Manhattan, Kansas, and modification of its license for Station KMKF to specify operation on the C2 channel. That proposal was set forth in a *Notice* in another proceeding, MM Docket 85-309. *See* 50 FR 43415 (October 25, 1985). The *Notice* in that proceeding indicated that the proposed modification could not be implemented if another party expressed an interest in the non-adjacent channel unless an additional equivalent class channel could be made available in accordance with Section 1.420(g) of the Rules. Other expressions of interest were filed for the channel and, on March 4, 1987, Manhattan requested withdrawal of its petition for modification and substituted a new proposal to allot adjacent Channel 268C2 to Manhattan. A staff study confirmed that Channel 268C2 could be allotted to Manhattan with a site restriction 13.2 kilometers (8.2 miles) northeast. However, Manhattan's new proposal conflicted with KNZA's pending modification proposal in this proceeding. The Commission, while unable to dismiss Manhattan's request for Channel 284C2 in view of other potential applicants for the channel at Manhattan, treated Manhattan's 268C2 proposal as a counterproposal in this proceeding, and consolidated the proposal for 268C2 at Manhattan into this proceeding.[4]

4. KNZA, in response to Manhattan's proposal, suggested resolving the conflict by substituting Channel 280C2 instead of Channel 268C2 for Channel 280A at Hiawatha, thereby allowing Manhattan the opportunity to upgrade on adjacent Channel 268C2. To accommodate Channel 280C2 at Hiawatha, Station KQLA-FM, Ogden, Kansas, must vacate Channel 280A. KNZA has proposed Channel 288A as a substitute at Ogden and expressed a willingness to reimburse Station KQLA-FM for necessary expenses required to change from Channel 280A to 288A. KNZA'a counterproposal, filed April 30, 1987, came before the initial comment date in this proceeding, May 1, 1987.

5. Kaw Valley, licensee of Station KQLA-FM Ogden, Kansas, objects to KNZA's proposal to move it from one Class A to another Class A. Kaw Valley argues that to force it to change from Channel 280A to 288A will cause significant public confusion and could potentially disrupt the service received by KQLA's listeners. Kaw Valley, however, states its willingness to move from Channel 280A to accommodate Manhattan and KNZA's upgrades provided its license is also modified to specify a Class C2 channel.[5] Kaw Valley argues that its proposal is superior to that advanced by KNZA as it allows three existing Class A stations to upgrade their facilities.

6. In a separate but related proceeding, Solomon Valley Broadcasting, Inc. has proposed the substitution of Channel 288C2 for Channel 288A at Beloit, Kansas, and modification of its license for Station KVSV-FM to specify the C2 Channel. *See* MM Docket 87-595, 3 FCC Rcd 165 (1988). Channel 288C2 can be used at KVSV-FM's existing site. KNZA's proposal to substitute Channel 288A for 280A at Ogden is short spaced to Channel 288C2 at Beloit.

7. In Order to proceed with the proposals in this proceeding, it is necessary to issue an Order to Show Cause to Station KQLA, Channel 280A, Ogden, Kansas, why their license should not be modified to specify operation on a different Class A channel. To avoid a conflict with the proposed upgrade at Beloit, Kansas, and to prevent foreclosing an opportunity for Kaw Valley to upgrade its existing service, we shall propose the substitution of Channel 278A rather than 288A at Ogden,[6] as follows:

Community	Delete	Add
Ogden, Kansas	280A	278A

KNZA, Inc. has acknowledged a responsibility to reimburse Kaw Valley for the reasonable and prudent expenses Station KQLA would incur in changing to another Class A channel.

8. The Commission has made a preliminary determination that the public interest would be advanced by allotting Channel 268C2 to Manhattan and Channel 280C2 to Hiawatha and modifying their license accordingly, to specify the higher class channel. A final determination regarding these amendments to the Table must await the outcome of this show cause order concerning the license modification of Station KQLA, Ogden, Kansas, as discussed herein. Although Station KQLA is provided an opportunity to object to the ordered channel change, this

Order does not afford additional opportunity either to comment on the merits of the conflicting proposals or for the acceptance of additional counterproposals.

9. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Kaw Valley Broadcasting Company, licensee of Station KQLA, Ogden, Kansas, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 278A instead of Channel 280A.

10. Pursuant to Section 1.87 of the Commission's Rules, Kaw Valley Broadcasting Co. may not later than **June 16, 1989,** file a written statement showing with particularity why its license should not be modified as proposed in the Order to Show Cause. The Commission may call on Kaw Valley Broadcasting Co. to furnish additional information. If Kaw Valley Broadcasting Co. raise a substantial and material question of fact, a hearing maybe required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Kaw Valley Broadcasting will be deemed to have consented to the modification as proposed in the Order to Show Cause, and a final order will be issued by the Commission if the above-mentioned channel modification is ultimately found to be in the public interest.

11. IT IS FURTHER ORDERED, That the Secretary SHALL SEND a copy of this Order to Show Cause BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to Kaw Valley Broadcasting Co., 5008 Frontage Road, Rt. 1, Box 104, Manhattan, Kansas 66502.

12. IT IS FURTHER ORDERED, That the Secretary SHALL SEND a copy of this Order to Show Cause BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to Solomon Valley Broadcasting, Inc., P.O. Box 7, Beloit, Kansas 67420.

13. A copy of any comments filed by Kaw Valley Broadcasting in this proceeding should be served on the following parties:

Nancy L. Wolf
Dow, Lohnes & Albertson
1255 - 23rd Street, N.W.
Washington, D.C. 20037
(Counsel for Manhattan Broadcasting Co.)

Richard J. Hayes
1359 Black Meadow Road
Spotsylvania, Virginia 22553
(Counsel for KNZA, Inc.)

Solomon Valley Broadcasting, Inc.
P.O. Box 7
Beloit, Kansas 67420

14. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

15. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] This community has been added to the caption.

[2] Public Notice was given on May 20, 1987, Report No. 1661 (RM-5923).

[3] On February 17, 1989, Valley Broadcasting, Inc., filed a petition for leave to file comments and reply comments. Those pleadings, and any responsive pleadings that may be filed, will be addressed in a subsequent document.

[4] *See Report and Order* in MM Docket 85-309, 2 FCC Rcd 5081 (1987), para. 3.

[5] This proposal was mentioned in MM Docket 85-309. *See* 2 FCC Rcd 5081, n.4 (1987).

[6] A staff analysis confirms that Channel 278C2 can be allotted to Ogden, Kansas, with a site restriction, for use by Station KQLA. We are not free to implement that change in this proceeding because the proposal for Channel 278C2 was advanced after the comment date. However, we may issue a Notice of Proposed Rule Making to upgrade Station KQLA's facilities upon adoption of an order in this proceeding, in the event we determine that substituting Channel 278A for Channel 280A would serve the public interest.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-92

In the Matter of

Amendment of Section 73.202(b), RM-6660
Table of Allotments,
FM Broadcast Stations.
(Bishopville, Maryland)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 11, 1989; Released: April 25, 1989

By the Chief, Allocations Branch:

1. John P. Gillen (petitioner), has requested the allotment of FM Channel 295A to Bishopville, Maryland, as that community's first FM broadcast service. Petitioner states that he intends to apply for authority to build and operate the proposed Bishopville facility, if allotted.

2. Petitioner notes that Bishopville, (population 2,700)[1] is located on Maryland's Eastern shore in Worcester County, which he describes as a host to vacationers from the entire mid-Atlantic region. According to petitioner, Bishopville, although not an incorporated community, has its own zip code and is an essential community in Worcester County.

3. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission fairly, equitably, and efficiently distribute frequencies " . . . among the several states and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to satisfy its status. Bishopville is not listed in the 1980 U.S. Census.[2] Therefore, petitioner should present the Commission with sufficient information to demonstrate that Bishopville has the social, economic or cultural indicia to qualify it as a "community" for allotment purposes. *See Ansley, Alabama*, 46 FR 58688 (1981); *Cascade Village, Colorado*, 48 FR 199177 (1983); *Ellwood, California*, 50 FR 13031 (1985).

4. We believe that petitioner's proposal to provide Bishopville with its first local service, should it ultimately be deemed a community, warrants further consideration. Therefore, we shall invite comments on the proposal to allot Channel 295A to Bishopville.

5. A staff engineering analysis indicates that Channel 295A can be allotted to Bishopville consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided there is a site restriction 4.1 kilometers (2.5 miles) southeast of the community. [3] The site restriction will prevent a conflict with Channel 294A (vacant), North Cape May, New Jersey and Station WCTD-FM, Channel 296A, Federalsburg, Maryland.

6. In view of the above, we believe it is appropriate to seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Bishopville, Maryland, as reflected below:

	Channel No.	
City	Present	Proposed
Bishopville, Maryland	---	295A

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **June 16, 1989,** and reply comments on or before **July 3, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John P. Gillen
Route 1, Box 23
Bishopville, Maryland 21813

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Population figure was supplied by petitioner.

[2] We do note that Bishopville is listed in the Rand McNally Commercial atlas as having a population of 215. The atlas also indicates Bishopville has a Post Office and a zip code.

[3] The coordinates for Channel 295A at Bishopville are 38-24-58 and 75-09-39.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-93

In the Matter of

Amendment of Section 73.202(b), RM-6372
Table of Allotments,
FM Broadcast Stations.
(Imboden, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 11, 1989; Released: April 25, 1989

By the Chief, Allocations Branch:

1. A petition for rule making has been filed on behalf of Jim Atkinson (petitioner) proposing the allotment of FM Channel 245A to Imboden, Arkansas, as that community's first local broadcast service. Petitioner stated his intention to apply for the channel if allotted.

2. The requested allocation of Channel 245A to Imboden conflicts with a pending request filed by James M. Hunt, permittee of Station KXOZ(FM), Channel 244A, Mountain View, Missouri, requesting the substitution of Channel 245C2 for Channel 244A and modification of his permit accordingly (RM-6404). In an effort to resolve the conflict, a staff engineering analysis has determined that Channel 289A can be allotted to Imboden, Arkansas, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 2.2 kilometers (1.3 miles) northwest[1] of the community. Such restriction is required to avoid a short-spacing to the proposed use of Channel 287A at Hoxie, Arkansas[2] in MM Docket No. 87-563. Imposition of the site restriction will also clear the licensed site of Station KCAZ(FM), Channel 292A, Walnut Ridge, Arkansas. [3]

3. In view of the fact that Imboden could receive a first local broadcast service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Imboden, Arkansas	--	289A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 16, 1989,** and reply comments on or before **July 3, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's consultant, as follows:

Dan Winn
Dan Winn & Associates
P.O. Box 214
Little Rock, AR 72203

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Reference coordinates at the restricted site are 36-13-05 and 91-11-27.

[2] Reference coordinates for this proposal are 36-02-24 and 90-59-11.

[3] Reference coordinates at the transmitter site of Station KCAZ(FM) are 36-03-58 and 90-56-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-237

In the Matter of

Amendment of Section 73.202(b), RM-6130
Table of Allotments,
FM Broadcast Stations.
(Joshua Tree, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 11, 1989; Released: April 25, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 3117 (1988), issued at the request of Craig L. Fox (petitioner), proposing the allotment of Channel 221A to Joshua Tree, California, as that community's first local broadcast service. Petitioner filed comments in response to the Notice.[1] John J. Davis (Davis) filed opposing comments.

2. Although petitioner initially supported his proposal, he subsequently advised that he no longer wishes to pursue the rule making proposal. Since the proposal was made at the request of the petitioner, and no other expression of interest in its use was received, we shall dismiss it. *See, e.g., Williams, AZ*, 47 FR 20827 (1982), and paragraph 2 of the Appendix to the *Notice*.

3. In view of the above, IT IS ORDERED, That the petition of Craig L. Fox IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] These include additional comments filed after the cut-off date provided therefor. Although they were not accompanied by a motion to accept nor a certificate of service, they will be accepted for the express purpose of permitting petitioner to withdraw his interest in the proposed allotment.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

AMERICAN MOBILE DATA COMMUNICATIONS, INC.

File No. W-2667

For Waiver and Other Relief to Enable the Construction of a Nationwide Two-Way Mobile Data Communications Network

MEMORANDUM OPINION AND ORDER

Adopted: April 12, 1989; Released: April 25, 1989

By the Commission:

I. INTRODUCTION

1. American Mobile Data Communications, Inc. (AMDC), a wholly-owned subsidiary of RAM Broadcasting Corporation (RAM), on August 15, 1988, filed a request for waiver and other relief to permit construction of a nationwide two-way mobile data communications network using frequencies in the 900 MHz band allocated to the Specialized Mobile Radio (SMR) Service. In light of the proposal's size, scope, and novelty, we issued a *Public Notice*, (No. 266, released October 26, 1988), soliciting comments. Eleven parties responded to our Public Notice.[1] AMDC filed pleadings in reply,[2] as did ASNA and NSP.

II. BACKGROUND

2. AMDC proposes, through its network, to bring the benefits and efficiencies of digital technology to business, public agency and other users lacking the financial resources and technical expertise to construct and operate individual systems. Digital signals are less susceptible to interference than are analog signals, AMDC states, and are capable of carrying a much greater volume of traffic within a given bandwidth. AMDC expects, in this regard, that each channel of a ten-channel system in its digital network will be able to serve as many mobile units as a fully loaded ten-channel trunked voice system. Thus, one of its ten-channel digital systems will support as many as 10,000 or more data terminals in each market, more than ten times the capacity of a fully loaded traditional trunked SMR system. [3] A variety of factors contribute to this efficiency, AMDC asserts, including the fact that less time is necessary for transmission of digital messages than for voice dispatch messages, and the planned use of equipment capable of operating at data speeds of 1200 to 4800 baud, with increased speeds contemplated in the future.[4]

3. AMDC contemplates a network architecture consisting of local or regional nodes interconnected via a public packet switching network. This architecture, it states, will permit local service, regional service, non-contiguous multiple city service and national service, as individual customers desire.[5] Access to central data bases, for example, will permit field sales personnel and service technicians to verify immediately inventory availability, customer records and credit histories. Police and other public safety personnel will have access to criminal, stolen property and similar national data bases as well. Regional and nationwide coverage will allow freight companies and couriers to trace packages as they travel through the country and to reroute deliveries in transit where appropriate. A mobile unit in one city will be able to communicate with and obtain information from a data base in a city across the country as easily as it can communicate with mobiles and control stations in its own city.[6] There are countless applications for its proposed service, AMDC concludes.

4. AMDC states that until now the investment and expertise required for a nationwide mobile data communications system have placed such service beyond the reach of most potential users. Only a few large entities can afford and fully utilize a single user nationwide service.[7] By spreading the cost and distributing the benefits among many users, AMDC claims that its proposed network will make nationwide mobile data service available for the first time to a wide, diverse customer base. AMDC maintains that there exists a widespread need and demand for such a service, a need and demand that its network will satisfy. To construct and operate the network as proposed, AMDC seeks waiver and other relief in three general categories.

III. RELIEF REQUESTED

5. *Acquisition and construction.* AMDC seeks to include in its network digital SMR systems in 46 Designated Filing Areas (DFAs).[8] Because of the large number of participants in the 900 MHz SMR lotteries, AMDC was able to acquire by lottery only two licenses through its parent company, RAM. It proposes to complete its network with systems licensed to others and purchased from them. The Commission's Rules prohibit assignment of unbuilt systems.[9] AMDC asserts that the construction requirements for digital systems differ from those of traditional trunked voice systems. Hence, systems constructed for normal SMR use, AMDC states, would be unsuitable for inclusion in its digital network. Rather than buying completed trunked systems and dismantling them because they are of no use to it, therefore, AMDC wishes to contract with existing licensees and tentative selectees to construct and manage their systems, subject to licensee supervision and control. It will enter into options to purchase as well. To the extent that waivers and other relief are necessary during the life of the management contracts, they will be requested on a network-wide basis to be made applicable to individual participants.[10,11]

6. *Extended implementation schedule.* AMDC requests an extended implementation schedule of five years for its network,[12] permission to deviate somewhat from its implementation schedule without automatic cancellation occurring, and relief from interim loading requirements. To this end, it requests waivers of Sections 90.629 and 90.631(b) and (e) of our Rules, 47 C.F.R. §§ 90.629 and

90.631(b) and (e). As grounds for waiver, AMDC claims that its proposed network is an innovative, spectrum efficient, and ambitious project of large scope and scale. As such, AMDC maintains, it meets the criteria for relief of this nature established by *IBM Research and Development, Inc.*, 53 RR 2d 675 (1983), and *Advanced Train Control System*, 3 FCC Rcd 427 (1988).[13] AMDC requests further that it be permitted four years from the date construction is completed to load its system.

7. *Wide area network design*. AMDC states that the Commission already allows 900 MHz SMR tentative selectees in certain markets to request specific blocks of frequencies and to enter into agreements with co-channel tentative selectees to accept transmitter locations within the seventy mile separation limit.[14] It asks that the Commission accommodate similar requests from network participants.[15] It also seeks such relief as is necessary to permit implementation of its system design, which provides for multiple base stations, in most cases arranged in a grid pattern, with channels allocated among several base stations and no one base station using all ten channels assigned. (One base station per DFA would be identified as "primary" and all others would operate on a secondary, non-interference basis.)[16]

IV. THE COMMENTS

8. One point bears special mention at the outset. Whatever their position on the merits of AMDC's various requests, the parties addressing this issue agree that the concept of a digital data network promises significant benefit to the public. "McCaw concurs with AMDC's assessment that wide-area mobile digital data networks would make valuable new services available to American consumers."[17] ASNA "is enthusiastic about the promise of digital technology generally, and about AMDC's plan to provide a commercial, nationwide mobile data communications system to small and mid-size businesses."[18] "Based on our experience over the past ten years," offers the Detroit Police Department, "there is a need for an affordable nationwide two-way mobile data communications network as proposed by American Mobile Data Communications, Inc. The proposed network will enable smaller police departments and other public safety agencies who cannot otherwise afford the backbone equipment to have availability to contemporary two-way mobile data services."[19] APCO concurs that AMDC's proposed service would be of value "particularly to smaller local governmental entities that cannot otherwise meet local mobile data requirements."[20]

9. *Procedural issues*. Turning first to the procedural framework of AMDC's request, several commenters argue that rule making, not waiver, is the proper vehicle for addressing AMDC's concerns. AMDC seeks "very broad, indeed extraordinary, revisions of the Commission's rules," they argue,[21] which is beyond the scope of a waiver. A new regulatory framework is necessary to address the special needs and demands imposed by wide-area mobile data network services and to insure that all options for promoting such networks are explored.[22] Some commenters maintain that AMDC "does not present a specific showing of 'unique circumstances' as required by Section 90.151 for the waiver of established rules."[23] This group urges that under these circumstances, consideration of AMDC's request as a waiver request is improper.

10. *Acquisition and construction*. Only ASNA addresses AMDC's proposed acquisition and construction plan and states that agreements negotiated by AMDC should comply with applicable Commission requirements as to management contracts.[24] ASNA also advises that any waivers or other relief granted individual licensees should be conditioned upon their continued participation in the network.[25]

11. *Extended implementation schedule*. Of the parties discussing AMDC's request for an extended implementation schedule, only DRN comments favorably. "[T]he loading standards and construction deadlines intended for 'substitutable' private systems (*i.e.* SMRs) do not serve the public interest for innovative, nationwide systems," DRN maintains, which "necessarily require greater resources and time to develop."[26] According to other commenters, however, the one year construction requirement is "emblematic of the entrepreneurial risk-taking orientation which is the premise on which the SMR industry has been built,"[27] and its enforcement is the regulatory cornerstone of the SMR industry. According to these commenters, AMDC has not made the showing of unique circumstances and lack of alternatives necessary for waiver of this fundamental requirement. In this regard, several commenters argue that 900 MHz spectrum is and will remain plentiful in most markets and thus AMDC should be able to obtain channels when it is actually ready to construct.[28]

12. As for AMDC's reliance for precedent on the IBM and AAR systems previously authorized by the Commission, ASNA claims that these were internal, non-commercial systems proposed by entities able to provide a detailed description of their construction and operation at the time waiver was sought. AMDC, in contrast, plans a commercial SMR service, which, according to ASNA, is purely speculative in that it is designed to meet the potential needs of an unknown market.[29] NABER opposes the requested four-year-after-construction loading deadline as unnecessary in light of spectrum availability, which will make channel recovery actions unlikely in most markets, and potentially unfair to licensees in other markets, who may have to compete with AMDC for customers to satisfy loading requirements.[30]

13. *Wide area network design*. Turning finally to the proposed wide area network design, ASNA and NABER, the two parties filing comments on this topic, both offer their support. NABER urges that a single base station be designated "primary" for purposes of protection and that all other base stations operate on a non-interference basis in relation to co-channel systems.[31] ASNA affirms the concept of flexibility in system design for AMDC and for all other SMR operators as well, and suggests that AMDC may wish to seek primary status at each of its sites.[32]

V. THE REPLIES

14. *Procedural issues*. Turning first to the procedural aspects of the request, AMDC asserts that waiver rather than rule making is indeed the proper course of action.[33] Section 90.645(d) of the Commission's Rules, 47 C.F.R. § 90.645(d), specifically permits data-only transmission in the SMR service. Thus, as AMDC points out, its selection of transmission techniques is well within current regulations.[34] Hence, the choice of digital technology is not so novel as to require rule making on these grounds. AMDC asserts that the Commission has emphasized the impor-

tance of allowing SMR operators flexibility in their choice of technologies, citing our *Report and Order*, PR Docket No. 86-404 (*M & S Decision*), 3 FCC Rcd 1838, 1848-49 (1988), *aff'd* 4 FCC Rcd 356 (1989). In addition, permitting more efficient use of spectrum is a recognized basis for waiver.[35] Furthermore, AMDC maintains, the Commission has expressed specific support for the concept and development of nationwide data operations employing the marketplace process.[36] AMDC concludes that these considerations render its proposal neither too "sweeping" nor too "novel" to be evaluated through the waiver process.[37] As for allegations that it has failed to make a showing of "unique" circumstances sufficient to justify waiver, AMDC characterizes them as both inherently contradictory to arguments that rule making is essential and as patently at odds with the description of its system contained in its pleading.[38]

15. *Extended implementation schedule.* Acknowledging concerns that the one year construction requirement not be undermined, AMDC rejects the "implicit suggestion" that its request for a five year construction period is a "matter of business choice, not necessity."[39] It argues that its business interest is to complete construction as quickly as possible. The extensive experience of its principals, discussions with potential equipment vendors, and responses from specific equipment vendors to its recent Request for Information with respect to the project, convince AMDC that five years is a reasonable construction period,[40] not because the proposal is beyond the present state-of-the-art, but rather because the complexity of system design, implementation and construction create a task "of a different order of magnitude than that which would be required to construct traditional voice SMR systems."[41] AMDC contends that this distinguishes its request from previous requests by SMR licensees for waiver of the one year construction requirement, and places it instead within the precedent established by the *Advanced Train Control* and *IBM* decisions for systems of a complex and innovative nature.[42]

16. With respect to the assertion that extended implementation is unnecessary in light of the continuing availability of 900 MHz spectrum, AMDC urges that the absence of scarcity undermines the basis of this objection. The policy of strict adherence to construction requirements rests upon spectrum scarcity, it argues. Moreover, access to the top 50 markets is essential to the success of its network.[43] Should the Commission require evidence of its commitment to the project, AMDC offers to accept conditions that licensees granted extended construction periods will not build as conventional voice systems and that licenses for systems will cancel automatically if not built within the allocated time period.[44] AMDC also expresses willingness to demonstrate its financial commitment by certifying that it has made specific expenditures and/or financial commitments by specified target dates.[45]

17. AMDC maintains with respect to its proposed four year loading schedule that it wishes to adjust, not increase, the time generally permitted licensees to meet applicable requirements. It seeks simply to apply the four year loading period to the extended construction deadline. AMDC asserts that NABER, the only party objecting to this aspect of its proposal, concedes that it is consistent with Commission policy. Given the Commission's decision to phase out loading requirements altogether,[46] applying a more stringent loading standard to it than to other licensees is inappropriate, AMDC concludes.[47]

18. *Wide area network design.* Turning finally to its wide area network design, AMDC characterizes it as "essential for reliable data service and in-building coverage."[48] There is no question that Commission rules permit satellite stations on a secondary, non-interference basis.[49] While the rules are silent as to whether SMR licensees must construct all channels at a single base station, AMDC acknowledges that there may be a policy to this effect and, if so, requests appropriate relief. If it is required to operate all of its channels at a single site, "AMDC would be prevented from effectively reusing frequencies within a DFA . . . result(ing) in AMDC's system being less spectrum-efficient than it would otherwise be."[50] While agreeing with ASNA's suggestion that all sites be afforded primary status, AMDC expresses its understanding that the Commission may wish to explore this and other forms of technical relief in the context of a rule making proceeding. It affirms its preparation, in the interim, to go forward with such marketplace solutions as frequency exchange agreements and agreements to accept less than seventy-mile spacings.[51]

VI. DISCUSSION

19. The Communications Act of 1934, as amended, directs us to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more efficient use of radio in the public interest."[52] AMDC's proposal will bring the benefits and efficiencies of nationwide digital service to users heretofore unable to take advantage of such service. Certainly, the proposal falls squarely within the spirit of our statutory mandate. As a consequence, we seek to encourage the development and implementation of AMDC's network, within existing policy where possible and with rule waivers where necessary and appropriate. In addition, waiving certain provisions of our rules to allow AMDC to construct its nationwide mobile data communications network is consistent with our granting of waivers to authorize the unique communications systems proposed in the *IBM* and *Advanced Train Control* applications.[53] The public interest, convenience and necessity favor this regulatory approach and we adopt it here.

20. *Acquisition and Construction.* AMDC requires no waiver or other relief to create its network as proposed.[54] The mechanism that AMDC has chosen for its purposes, the management contract, is an accepted, established feature of the SMR industry. We have recognized its role there and established specific guidelines for its use, *Guidelines Concerning Management Contracts*, *supra*. These guidelines emphasize the requirement that licensees retain *bona fide* proprietary interest in and control over their systems. AMDC has acknowledged these requirements and pledged itself to abide by them.[55] During the period in which AMDC constructs and manages systems participating in its network, control and supervision of the systems will remain firmly with the licensee of record. We are satisfied from its pleading that AMDC is aware of its obligations in this area. With the understanding that it will fulfill them as well, we see no obstacles to AMDC entering into management contracts with existing licensees as a means of assembling its nationwide system.

21. *Extended implementation schedule.* Our rules[56] acknowledge that not all systems can be constructed in one year and provide for construction periods of up to three years for certain categories of applicants[57] under certain

circumstances. These circumstances include, in pertinent part, construction demands complicated by the purpose, size or complexity of the system proposed. For highly innovative and technically advanced proposed systems, we have modified our extended implementation provision to broaden the scope of its coverage[58] or the length of time permitted for construction.[59] AMDC's proposed nationwide two-way mobile data system is innovative and advanced. It is also broad in scope, requiring construction of a great many individual systems for its success. Given these characteristics, AMDC's proposal would ordinarily fall squarely within existing precedent. What sets it apart from prior cases and requires further consideration and discussion is its status as a network of SMR systems.

22. As ASNA states in its comments, "the Commission's rules . . . do not provide an extended implementation option for SMR systems because of the fundamental conviction that in a world of limited spectral resources, commercial service providers must use it or lose it."[60] Choices as to equipment, transmitter sites, and other aspects of construction are treated, in this context, as independent business judgments within the licensee's control. As such, they consistently have been held insufficient to justify waiver.[61] AMDC, however, has persuaded us that unique circumstances are involved and that no reasonable alternative solution can be found in existing rules.[62] Hence, we conclude that waiver of the one year construction period is warranted.

23. AMDC's proposed network will be the largest shared general access mobile data communications system in the world, in terms of the number of cities served, the number of base stations required and the number of people residing in the service areas.[63] Further, its construction demands will differ from those of a conventional voice system in hardware, software, and antenna site selection and preparation. Where the typical SMR licensee may choose from among several existing components, all of them available to it within a matter of months, AMDC will have to modify existing components and, in all likelihood, develop new hardware and software as well.[64] AMDC will then have to integrate components to create local networks and integrate each local network with a public packet switched network. These steps, unnecessary in the traditional trunked SMR systems, will require extensive field trials and testing.[65] Site selection will also present problems unknown to traditional SMR operations in that AMDC's sophisticated computer equipment will require an environment more controlled and regulated than is called for in a typical SMR station.[66]

24. In distinguishing the construction demands of its network from those of the traditional SMR system, AMDC has identified for us the source of its information and the basis of its estimates. [67] Given the nature of AMDC's proposal, this information does not and cannot specify precise components or exact locations. In this regard, as commenters have remarked, the proposal differs from those considered in previous cases. AMDC's proposal is a novel and complex one that will require experimentation and adjustment as it develops. Precision is simply impossible at this early stage. We are satisfied from the pleadings, though, that AMDC's proposed system differs sufficiently from a conventional system to make normal construction standards inapplicable. We conclude, as a result, that the circumstances are "unique" within the context of our waiver provision.

25. As for the question of whether there are alternative approaches within the rules, some commenters suggest that 900 MHz spectrum is and will continue to be available in most markets. Therefore, they claim, AMDC should be able to acquire spectrum when actually ready to construct. We acknowledge AMDC's assertion that nationwide coverage is essential to its success and agree that assumptions or predictions that abundant spectrum will be available when it is needed are no substitute for actual authorizations. Furthermore, to the extent that spectrum is plentiful, the dangers of warehousing and hoarding are diminished. ASNA proposes, as a related matter, that AMDC be required to construct conventional systems to preserve authorizations in markets subject to channel recovery actions. These systems would then be dismantled and rebuilt as digital systems when circumstances dictated.[68] We see no useful purpose in this approach. Thus, we find no reasonable alternative under our rules to allowing an extended implementation schedule.

26. In response to a Request for Information issued by AMDC, several equipment manufacturers proposed construction periods of three to four years, assuming no unanticipated delays or hurdles. AMDC seeks a five year period to cover contingencies inevitable in a project of this magnitude.[69] While an extension of time to implement AMDC's proposed nationwide system is in the public interest, we are not convinced that a five year extension is warranted. Section 90.629 of our Rules allows extended implementation schedules of up to three years for complex non-SMR systems, or other non-SMR "slow-growth" systems that will be part of a coordinated or integrated area-wide system that will take longer than a year to plan, fund and construct. Thus, we recognize that certain private land mobile communications systems will require more than one year to construct and that allowing this additional time to provide valuable communications services does not obviate our overall objective of assuring prompt use of scarce spectrum. We conclude that AMDC has demonstrated that it should receive similar treatment to that accorded non-SMR licensees proposing to build complex or other "slow-growth" systems. Accordingly, we will waive the one-year construction requirement for SMR systems and grant AMDC, through its network participants, three years to construct its network.

27. We will grant waivers of the one-year construction period to each network participant conditioned on the participant licensee constructing a digital system as part of AMDC's network in accordance with the implementation schedule submitted by AMDC and in no case more than three years from the release date of this *Order*. [70] If a licensee chooses to leave AMDC's network, it can maintain its license only if it constructs its "independent system," either conventional voice or digital, within its original one-year construction period. If a participant licensee leaves after the end of its original one year construction period without having completed construction, or fails to construct a digital system as part of AMDC's network in accordance with AMDC's implementation schedule, its license cancels automatically. Thus, a network participant has two ways to protect its authorization. It may either stay with AMDC and construct a digital system, or construct its own system within its original one-year construction period.

28. As noted above, we will require that AMDC provide in its implementation schedule a specific date for the construction of each individual system in its network,[71]

that it comply with its implementation schedule, and that it file semiannual reports of its progress.[72][73] We expect AMDC to request in a timely manner any needed deviations from its implementation schedule. Licenses for particular stations will cancel automatically without right of hearing for any non-approved deviations from the implementation schedule.

29. We will afford AMDC, as it has requested, four years from the proposed construction date of each individual system to load that system to the required level.[74] Under our rules[75] failure to meet loading requirements leads to automatic cancellation only where all 900 MHz SMR channels in the system's geographic area are assigned. At this early stage in the assignment of 900 MHz SMR spectrum, we do not know where or when this provision will be invoked. Accordingly, for those markets in which all 900 MHz SMR channels have been assigned, we will review the mobile loading of each individual system at the end of its four year loading period to confirm that at least 700 mobile units are in operation. Once a 10 channel system is operational, it must be loaded to at least 700 mobiles units within four years of the date AMDC submits for initiating service regardless of the number of base stations that are placed into operation during the four-year period.

30. *Wide area network design.* To the extent that AMDC pursues its goals through agreements among licensees to exchange frequencies or accept spacings of less than seventy miles, we will evaluate these agreements in accordance with existing standards. To the extent that AMDC wishes to implement a grid pattern of system design, construction of such a system is allowed by our current policies. We now allow 900 MHz SMR operators to select the mode of operation best suited to serve their needs and the needs of their clients, provided that their choice is comparably efficient to a traditional trunked system.[76] Efficient modes of operation other than trunking may depend on a system configuration substantially different from a trunked system. Consequently, network participants can construct multiple base stations when their digital system configuration increases efficient use of the spectrum.[77]

31. Licensees that construct satellite or secondary transmitter sites are afforded no interference protection for those sites from co-channel systems.[78] We do allow, however, partial assignment of SMR systems[79] and it is possible that a constructed 900 MHz 10 channel system could be assigned so that several licensees have the ability to construct the channels at various locations. These licensees are afforded interference protection from future 900 MHz co-channel licensees under most circumstances.[80] Affording AMDC the same protection as similarly-situated Phase I licensees, therefore, facilitates the same public interest policy objectives of our partial assignment multiple transmitter policies. Moreover, AMDC's digital communications network, as previously observed, has the potential for ten times the capacity of a traditional trunked SMR system. To the extent that AMDC finds it necessary to establish multiple transmitter sites, the full array of such sites within a DFA will be considered a single system and thus consistent with our rules that limit a licensee to one unloaded system per market.[81] To the extent that AMDC uses one or more of the same channels at multiple sites within a DFA, however, AMDC will receive primary protection only from a single site for each channel and must notify the Commission of the preferred sites.

32. In order to allow Phase II processing to be implemented, however, certain restrictions must be imposed. Sites that are constructed or sites for which applications have been filed at the Commission prior to our announcement of the initiation of Phase II will be afforded "primary" interference protection within the above cited conditions. Sites for which applications have been filed at the Commission after Phase II processing has been announced will be considered "secondary sites." Further, as we are not accepting partial assignment applications in certain markets,[82] we will not authorize construction of additional base station sites in these markets until partial assignments are accepted in such markets, unless applicants are willing to accept secondary status for these sites.

VII. ORDERING CLAUSE

33. Accordingly, pursuant to Sections 1.3, 1.103 and 90.151 of the Commission's Rules, IT IS ORDERED THAT:

(1) The provisions of 47 C.F.R. §§ 90.629 and 90.631(e) and (f) are waived to permit American Mobile Data Communications, Inc. three years from the release date of this *Order* in which to construct its nationwide two-way mobile data communications network. These waivers will be granted directly to network participants and will be adjusted for each licensee to reflect the AMDC implementation schedule.

(2) All waivers of the one year construction deadline will be conditioned upon the system not being constructed as a conventional voice system. Licenses will cancel automatically if construction as a digital system participating in the American Mobile Data Communications, Inc., network is not completed within the proposed construction period or if the licensee has not constructed an independent system within one year of its initial license grant.

(3) In accordance with the provisions of 47 C.F.R. § 90.629(b), American Mobile Data Communications, Inc. shall file with the Private Radio Bureau a revised implementation schedule that includes a specific construction date for each individual system in its network. American Mobile Data Communications, Inc. shall comply with this implementation schedule and shall file semiannual reports identifying systems fully constructed, with the number of channels and frequencies being used specified; systems partially constructed, with the extent of progress toward completion stated; and systems scheduled next for construction.

(4) Should a network participant choose to leave the network before construction is completed, it may construct an independent system within one year of its initial grant.

(5) Network participants may construct each authorized system at multiple sites within each DFA and receive primary interference protection for one site per channel, except that any station applications filed with the Commission after public announce-

ment of 900 MHz Phase II processing will be authorized only on a secondary, non-interference basis. Any additional sites in New York, Boston-Providence, Cincinnati-Dayton or Hartford will be authorized only on a secondary, non-interference basis pending release of a public notice permitting partial assignments in these market areas.

(6) Network participants shall be afforded four years from their proposed construction deadline to load their systems in accordance with Commission requirements.

(7) Authority to review the revised implementation schedule and semiannual progress reports submitted by American Mobile Data Communications, Inc. is delegated to the Chief, Private Radio Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Comments were filed by Associated Public-Safety Communications Officers, Inc. (APCO); American SMR Network Association, Inc. (ASNA); Cantel, Inc.; Cellular Telecommunications Industry Association (CTIA); Detroit (Mich.) Police Department; Digital Radio Networks, Inc. (DRN); GTE Service Corporation (GTE); McCaw Cellular Communications, Inc. (McCaw); National Association of Business and Educational Radio, Inc. (NABER) and Providence Journal Telecommunications, Inc. (PJTI). National Satellite Paging, Inc. (NSP) filed an opposition pleading.

[2] AMDC replied separately to the GTE pleading, which it stated was not served upon it.

[3] Waiver request at 2-3, 6-8.

[4] *Id.* at 7.

[5] *Id.* at 34.

[6] *Id.* at 3-5, 37.

[7] *Id.* at 5-6.

[8] DFAs are the geographic areas in which Phase I 900 MHz SMR facilities must be located. Generally the DFA approximates the boundaries of a market's Metropolitan Statistical Area as defined by the Census Bureau. Public Notice, Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz bands, 1 FCC Rcd 543 (1986).

[9] Section 90.609(b) of the Commission's Rules, 47 C.F.R. § 90.609(b).

[10] AMDC has requested interim relief for network participants whose construction periods end during the pendancy of this proceeding. We have independently granted this request via individual extensions of time to construct. Those extensions are conditioned on the outcome of this proceeding.

[11] Waiver request at 22-24.

[12] AMDC sets forth the following timetable:

Year	DFAs Constructed: Cumulative Total
1989	4
1990	15
1991	27
1992	38
1993	46

Waiver request at 49. We are requiring as a condition of relief that AMDC identify specific stations to be constructed each year. *See* paras. 28 and 33, *infra*.

[13] Waiver request at 12-18, 48-51.

[14] Public Notice, DA 86-173, 1 FCC Rcd 543, 545 (1986).

[15] AMDC plans also to negotiate possible channel swapping arrangements that will allow network participants to use common frequencies. Such trades are permitted by Section 90.645(h) of our Rules, 47 C.F.R. § 90.645(h), subject to notification to and approval by the Commission.

[16] Waiver request at 18-22.

[17] Comments of McCaw at 5.

[18] Comments of ASNA at 1-2.

[19] Comments of Detroit Michigan Police Department at 2.

[20] Comments of APCO at 2.

[21] Opposition of NSP at 3. *See* also comments of CTIA at 1-2, GTE at 1-3, PJTI at 2-5.

[22] Comments of McCaw at 8-15.

[23] Comments of CTIA at 1-2. *See* also oppostion of NSP at 3-5, comments of PJTI at 2-5.

[24] Those requirements are set forth in our Public Notice, Private Radio Bureau Reminds Licensees of Guidelines Concerning Operation of SMR Stations under Management Contracts (Guidelines Concerning Management Contracts), No. 1932, released March 3, 1988.

[25] Comments of ASNA at 6-7.

[26] Comments of DRN at 5.

[27] Comments of ASNA at 8.

[28] *Id.* at 10-11 *See also* PJTI at 7; Opposition of NSP at 7.

[29] *Id.* at 12-14.

[30] Comments of NABER at 8-9.

[31] *Id.* at 9-10.

[32] Comments of ASNA at 14-17.

[33] AMDC reply comments at 6-13.

[34] AMDC at 6-7, ASNA at 2-4.

[35] AMDC reply comments at 7-9.

[36] AMDC cites in this regard our Report and Order in Gen. Docket Nos. 84-1231, 84-1233 and 84-1234, 2 FCC Rcd 1825, 1836 (1986).

[37] AMDC reply comments at 6-13.

[38] *Id.* at 18.

[39] AMDC reply comments at 20. *See* also the Declaration of Carl Robert Aron, Chairman and Chief Executive Office of RAM, AMDC and RAM Communications Consultants, Inc., submitted as Appendix B to the reply comments (Aron declaration), at 9-10.

[40] AMDC reply comments at 23. *See* also the Declaration of Michael W. Hunter, Senior Vice President-Engineering of RAM and AMDC, President and Chief Operating Officer of RAM Communications Consultants, Inc., submitted as Appendix C to the reply comments (Hunter declaration) at 9-15.

[41] AMDC at 21-22, Hunter at 2-9.

[42] AMDC reply comments at 27-29.

[43] *Id.* at 23-24.

[44] AMDC at 29, Aron declaration at 10-11.

[45] AMDC at 30, Aron at 11.

[46] M&S Decision, 3 FCC Rcd at 1845-6.

[47] AMDC reply comments at 32-34.

[48] *Id.* at 34.

[49] Section 90.631(e) of the Commission's Rules, 47 C.F.R. § 90.631(e).

[50] AMDC reply comments at 35. AMDC adds in this regard that its system would still be far more spectrum-efficient than a conventional voice system.

[51] *Id.* at 36-37.

[52] 47 U.S.C. § 303(g).

[53] *See* para. 6, *supra*.

[54] We have extended the construction deadlines of certain network participants. *See* note 10, *supra*.

[55] Waiver request at 23.

[56] Section 90.629 of our Rules, 47 C.F.R. § 90.629.

[57] These include applicants in the Public Safety/Special Emergency, Industrial/Land Transportation, and Business Categories.

[58] IBM Research and Development, Inc. *supra*.

[59] Advanced Train Control System, *supra*.

[60] Comments of ASNA at 13.

[61] *See e.g.*, P&R Temmer v. FCC, 743 F.2d 918 (D.C.Cir. 1984).

[62] Section 90.151(a) of our Rules, 47 C.F.R. § 90.151(a), sets these as the standards for a waiver showing.

[63] AMDC reply comments at 21-22, Hunter declaration at 2-3.

[64] AMDC at 28-29, Hunter at 4-9.

[65] AMDC at 22-23, Hunter at 8-9.

[66] AMDC at 22, Hunter at 10-13.

[67] *See* Hunter at 4-14.

[68] Comments of ASNA at 10-11.

[69] AMDC reply comments at 23, Hunter declaration at 9-10.

[70] *See* para. 28, *infra*. We will adjust the actual construction period for each license to reflect the date specified in AMDC's implementation schedule.

[71] We will consider an individual system constructed when all of its primary base station facilities are completed and all ten channels operational and capable of initiating service. *See* para. 29, *infra*.

[72] Section 90.629(b) of our Rules, 47 C.F.R. § 90.629(b).

[73] We expect AMDC to follow in its scheduling and reporting the procedure that it used to seek interim relief from the one year construction requirement. *See* note 10, *supra*. Under this procedure, AMDC filed a single document setting forth all necessary information, and individual network participants filed separate concurring statements.

[74] We normally require an SMR system to load to a minimum of 70 mobiles per channel within five years of the initial license grant. Assuming one year for construction, that would leave four years for loading. Here, AMDC has requested four years from the date construction is completed for loading of each system. AMDC Waiver Request at 13. Thus, we are waiving the loading requirements of Section 90.631 of our Rules to the extent necessary to allow network participants four years to load their systems.

[75] 47 C.F.R. § 90.631.

[76] M&S Decision, *supra*, 3 FCC Rcd at 1848-9.

[77] Here, AMDC has demonstrated that its proposed system will, in fact, be more efficient than a traditional trunked system.

[78] Section 90.631(g) of the Commission's Rules, 47 C.F.R. § 90.631(g).

[79] Section 90.609(c) of the Commission's Rules, 47 C.F.R. § 90.609(c); Public Notice, Commission Clarifies Policy Governing Partial Assignment of 900 MHz, Mimeo No. 614, released November 23, 1988.

[80] *Id.*

[81] *See* 47 C.F.R. § 90.627(b).

[82] New York, Boston-Providence, Cincinnati-Dayton, and Hartford.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND SPECIFIED AT&T COMMUNICATIONS COMPANIES

File No. W-P-C-6227

For authority under Section 214 of the Communications Act 1934 as amended, to add circuits and to supplement existing facilities between various locations throughout the continental United States

ORDER AND AUTHORIZATION

Adopted: April 14, 1989; Released: April 25, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. American Telephone and Telegraph Company (and specified AT&T Communications Companies, hereafter collectively referred to as AT&T) has filed its annual Blanket Application (W-P-C-6227) pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214, and Section 63.06 of the Commission's Rules, 47 C.F.R. Section 63.06.[1] The application represents a substantial part of the interstate lines sought to be constructed by AT&T to meet service needs through 1989. AT&T states that the total construction cost for the facilities associated with this 1989 Blanket filing is estimated at $649.49 million.[2] This represents more than a doubling of last year's figure. [3] The construction costs are itemized in Appendix A.

2. The forecast of circuits for AT&T's 1989 construction plan totals 1,943,000 circuits, including both message and private line. Of these, 950,000 will be used by the AT&T Interstate Division (ISD) for message services, including MTS (Message Telephone Service), WATS (Wide Area Telephone Service) and 800 Service; 915,000 will be used for ISD private line; 56,000 for the domestic portion of overseas services; and 22,000 circuits are planned for Other Common Carrier (OCC) services. These totals include an estimated 216,000 circuits for intrastate message services and 110,000 circuits for intrastate private line services by the "AT&T Companies".[4] AT&T also requests authority to construct and equip fiber and coaxial circuits on certain routes shown in Exhibit 2 of the April filing. For the reasons discussed below, we grant AT&T's application.

II. BACKGROUND

3. The annual Blanket Application serves as the primary means by which AT&T obtains authority pursuant to Section 214 of the Communications Act for construction of new lines. It also serves as a vehicle for keeping the Commission informed of the technological and economic developments of the predominant communications network and service provider in the United States. As part of our analysis of the Blanket Application, we track certain statistical quantities that serve as network performance indicators, and develop statistical summaries that relate to the efficiency of the network. In addition to monitoring efficiency of usage, we are concerned with timely incorporation of new technical developments, long term trends in availability of services and quality of service. We monitor the number of messages handled by the network and the utilization of the circuits used to carry these messages. Also of interest in our analysis are mathematical techniques employed in forecasting traffic and circuit needs. Network performance and construction needs are evaluated using statistical and mathematical procedures that assess and track certain measurable indicators, known as metrics, that serve as surrogates for performance and efficiency. In fulfilling our statutory obligation to determine whether the proposed construction of new lines is in the public interest (47 U.S.C. §214) our focus is not on specific lines but rather is on aggregate network performance as a whole. If AT&T's forecasts are reliable, if aggregate utilization is within acceptable bounds and if its deployment of new technologies meets projections, our practice has been to approve the construction plan in the Blanket Application.

4. In the *1988 Blanket Order*, we analyzed AT&T's Application in terms of its circuit forecasts, facility utilization, application of new routing methodologies, the construction budget and technical trends. We also analyzed the statistics provided and compared them with data from previous years, and we projected the effect on the network of the current construction budget. Finally, we estimated the long range effects of technology trends. In our analysis of forecasting, we stated that we expect AT&T to provide backcasts with every future Blanket Application for each of the major market segment models (*e.g.*, MTS, WATS, 800 Service) for the five latest years for which actual data exist. We also requested AT&T to provide in future Blanket Applications actual and forecast data and the results of the comparisons of forecasts with actuals for the latest five years where actuals have been obtained, *i.e.*, the data for determining the quality of the forecasting models. AT&T was asked to provide the latest and the previous forecasts for each of these quantities, *i.e., MTS, WATS, and 800 Service messages as well as switched and private line circuits. See 1988 Blanket Order* at paras. 7-8. With regard to facility utilization, we asked AT&T to indicate in its subsequent Blanket Application whether the lower figures for "CCS per trunk",[5] "master group bay framework utilization" and "MTS channel group fill" from 1985 to 1986, as reported in its 1988 Blanket Application, were "merely an aberration or whether the trend toward higher figures that has occurred over the last 10 years has been altered." *Id.* at para. 12.

5. An issue in the *1988 Blanket Order* was the question of whether the use of Dynamic Non-Hierarchical Routing (DNHR)[6] improved network utilization.[7] In our discussion of AT&T's use of DNHR techniques, we noted that in order to determine whether utilization under DNHR is

greater than hierarchical trunk utilization, an appropriate metric is needed. We suggested that AT&T use the busiest week of the year and that data be collected using a modification of TAMP procedures. Alternatively, if AT&T considered this unduly burdensome, we asked that it provide a different reliable metric that will compare the performance of the two systems. *Id.* at para. 18.

6. In the *1988 Blanket Order* we discussed trends borne of new technologies. We discussed the increased use of fiber optics and the potential problem of network bottlenecks brought about by traffic handling limitations of electronic switches used as network nodes in fiber networks. We asked that AT&T include in its 1989 application a brief summary of major impending changes in technology. *Id.* at para. 26. Finally, we conditioned our authorization on the submission by AT&T of satisfactory semi-annual reports of actual construction and expenditures completed during 1988. *Id.* at para. 31.

III. DISCUSSION

7. The 1989 AT&T Blanket Application contains financial and engineering information relevant to the construction budget, the extent of actual facility utilization and the percent of "optimum" utilization represented by the data provided. In our consideration of AT&T's 1989 Blanket Application, we examine the forecasting models used by AT&T to plan construction budgets, determine facility needs and gauge business trends. We compare AT&T's forecasts with actual data and ascertain whether it has complied with our requests regarding forecasting data as stated in the *1988 Blanket Order*.[8] We also examine overall network utilization.[9]

8. Because the introduction of new technologies has major public interest implications both in terms of cost and service, we have tracked the progress of DNHR for several years. We review new technologies that hold promise for increased network efficiency or cost effectiveness, and we analyze AT&T's projected expenditures and estimate the effects on the network.

9. *Forecasting*. Forecasts are used to plan construction budgets, determine facility needs and gauge business trends. In past Blanket Orders we have asked AT&T to undertake certain steps in reporting the quality of its forecasts. A forecasting model's performance is determined by its expected error, which is bounded by a statistical confidence interval at a given confidence level, *e.g.*, 95%. We require AT&T to conform to proper statistical practice by calculating a confidence interval at a sufficiently high confidence level for all forecasts. AT&T, however, had stated that statistics more than 5 years old are irrelevant. It had explained that for this reason it had been unable to arrive at a reasonable confidence interval at an acceptable confidence level. In response, we suggested a non-parametric method which determined a confidence interval for a sufficiently high confidence level using only the past five years.[10] Also, since 1986, the Bureau has required AT&T to provide backcasts so that we can evaluate the precision of its various forecasting models. AT&T makes demand forecasts two years and one year in advance. It reports differences between the forecasts in the same manner that it reports comparisons between forecasts and actuals, *i.e.*, it calculates a confidence interval at the acceptable confidence level.[11] Comparison of AT&T's forecasts with actual data provided leads us to conclude that the models are performing well. It appears that AT&T has complied with our requests regarding forecasting data as stated in para. 7 and 8 of the *1988 Blanket Order*.

10. *Facility Utilization*. As noted in earlier Blanket Orders, to evaluate the performance of telecommunications networks it is necessary to track such traditional utilization figures as "average CCS per trunk" and "circuit fill". Appendix C shows that actual CCS per trunk for 1987 [28.5] has improved over 1986 [27.5], but this improvement only returns the figure for 1987 to the nominal level of 28.6 achieved between 1983 and 1985.[12] The optimum levels have been increasing monotonically since 1981, so that as a percentage of optimum the 1987 figure is seemingly low. Furthermore, the estimate for 1989 is 27.1-27.7, as compared to 29.5-30.1 in 1988 and estimates for 1985 to 1987 of at least 28.0.[13] Another traditional utilization measure is "MTS channel group fill", *i.e.*, the percentage of installed circuits actually used for messages. The figure for 1987 is 91.2%. However, this compares to 95% in 1986 and 97.4% for 1985. Master group bay framework utilization for 1987 was 67.1% as compared to 68.2% in 1986 and 73% in 1985.

11. *DNHR*. Over the past few years, AT&T has been converting its network from a hierarchical routing structure to Dynamic Non-Hierarchical Routing.[14] When its network was hierarchical, AT&T used the TAMP monitoring scheme to determine traffic on all trunk groups for the peak busy hour of the year. This peak measurement provided a means to assess the number of circuits required because peak traffic demand effectively defines the need for trunk construction. According to AT&T, DNHR trunks handle more traffic than hierarchical trunks. The underlying concept is that DNHR takes advantage of temporal variations in local or regional loading, routing traffic through time zones where the network is less congested.

12. *New technology*. One of our objectives in the annual Blanket Application process has been to examine technologies which hold the potential for major impact on the organization, structure and/or efficiency of the network. Examples of such techniques and technologies are DNHR, which has been extensively implemented, and the Integrated Services Digital Network (ISDN) which has been widely studied by AT&T and other international telecommunications organizations.[15]

13. Another area of technological development lies in fiber optics. Installation of fiber optic systems over the last decade has led to an enormous increase in transmission capacity and a corresponding decrease in the cost of transmitting a unit of information. There has been no such dramatic reduction in switching costs, however. Major programs have been implemented to replace older transmission systems with fiber. There has also been a recognition of the need to reexamine the basic tenets governing the design of network topologies.[16] The theoretical bandwidth of optical fiber is approximately 20,000 gigahertz (GHz).[17] Thus, potentially, the information rate of fiber optic transmission could be vastly increased relative to any commercial systems now operating. Several other techniques are being investigated that may provide increased information transmission rates. The first of these is coherent modulation, which if applied to fiber optics could provide greatly enhanced capacity.[18] The second technique is the use of optical wavelength multiplexers (photonic wavelength switches).[19] This technique would allow the simultaneous transmission of different

wavelengths of light over a single fiber. (The technique is analogous to frequency division multiplexing in radio or coaxial cable systems.) In short, these techniques have the potential of revolutionizing information carrying capacities of transmission systems to an extent comparable to the effect fiber optics had on transmission capacities. We ask that AT&T continue to keep Bureau staff timely informed of anticipated technological changes that hold promise for increased network efficiency or cost effectiveness.

14. *Construction budget.* In this section we analyze AT&T's projected expenditures and estimate the effects on the network, as indicated in terms of network capacity, service quality, and facility modernization requirements.

15. As noted, AT&T is expected to maintain a minimum acceptable quality of service under load fluctuations. It must therefore construct facilities which will yield the target service quality. Quality of service can be measured by one or more factors that relate to the probability of encountering a trunk busy condition and is directly related to network call handling capability.[20] Network call handling capability can sometimes be increased by improving network procedures such as routing, without an increase in circuits. Generally, however, increased capability is achieved by adding plant and facilities, which requires proper budgeting and reliance on accurate forecasts.[21]

16. In past years, the Commission has used as an informal benchmark for determining whether a construction budget is reasonable, *viz.*, the ratio of dollars to be expended to expected traffic increase. Factoring in an inflation factor, we have found this to be a good indicator of reasonableness. The construction budget for 1988 was approximately twice that of the year before. We did not find it unreasonable inasmuch as a substantial increase in traffic was projected and we allowed for an increase in the pace of modernization. The 1989 filing proposes an outlay some three times that of 1988. This apparent acceleration in expenditures could not be justified in terms of traffic increases alone.[22] Bureau staff asked AT&T for additional information to determine whether the proposed expenditures were justified. AT&T's response explains that it has consolidated into the Blanket Application many of the facility applications which in past years had been filed individually.[23] It states that though the 1989 Blanket Application dollar total is triple the 1988 total, the figure is misleading because the number of non-Blanket facility applications under Section 214 are actually expected to be fewer in 1989 than in 1988. AT&T acknowledges that its projected expenditures in 1989 will remain at a high level, and states that this represents an effort to accelerate the replacement of analog facilities with fiber optics and other digital systems. AT&T explains that at least some of the urgency to replace older analog facilities with fiber is due to "competitive necessity". It states, "AT&T planners believe this effort (replacement of analog facilities) is essential to improve service quality and capabilities, in line with customer expectations and competitive necessity". *Id.* As noted, this should maintain or enhance service quality. We find that while AT&T's expenditures for 1989 have increased substantially, they are not unreasonable.

IV. CONCLUSION

17. The Blanket Application process serves as a vehicle for accomplishing the mandate of Section 214 of the Communications Act. Examination of the Blanket Application reveals whether the facilities proposed by AT&T are required by the public convenience and necessity. Through earlier Blanket Application proceedings, we have iteratively developed reliable forecasting methodologies, *e.g.* by requiring that forecasts be stated in terms of statistical criteria such as confidence intervals. In general, the resulting models provide sufficient accuracy and reliability to properly assess demand forecasts offered by AT&T in support of its facility construction proposals. We have also analyzed AT&T's proposals based on surrogate measures of cost effectiveness, *e.g.* CCS per trunk, channel group fill and bay framework utilization figures. By tracking these measures over time we can assess the newly reported performance figures.

18. In our examination of its 1989 Blanket Application, we have reviewed the forecasting models used by AT&T to plan construction budgets, determine facility needs and gauge business trends. We compared AT&T's forecasts with actual data and found that the models AT&T uses are performing well and that AT&T has complied with our request regarding forecasting data as stated in paras. 7 and 8 of the *1988 Blanket Order*. We believe the construction program in the 1989 Blanket will serve the public convenience and necessity.

19. Finally, we have analyzed AT&T's projected expenditures and while they are considerably higher than last year's figures, this is explained in terms of inclusion of more projects in the Blanket proceeding and accelerated replacement of less efficient facilities. We also note that the recently adopted Price Cap Order[24] breaks the link between increases in AT&T's rate base and increases in rates and thus reduces our concern with the level of AT&T's expenditures.

20. For the reasons stated herein, we find that the facilities and expenditures reflected in AT&T's 1989 Blanket Application will enable it to fulfill its network and service requirements through 1989. As has been our practice with respect to information submitted with AT&T's Blanket Application in the past, we will honor requests that information regarding individual circuits be given confidential treatment. As stated in our *1986 Blanket Order, supra*, however, we will make available to the public bulk statistical data such as total number of circuits and overall expenditures during the six month period.

21. Accordingly, pursuant to Section 63.06 of the Commission's Rules and Regulations, IT IS CERTIFIED that the present public convenience and necessity requires the construction and operation of the facilities applied for in exhibits to AT&T's 1989 Blanket Application. Therefore, IT IS ORDERED that American Telephone and Telegraph Company and the Specified AT&T Communications Companies ARE HEREBY AUTHORIZED to construct and operate the facilities as specified in the captioned application.

22. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules must be filed within 30 days of the date of release of this order.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

APPENDIX A
Estimated Construction Cost*
(In Thousands)

Company	Multiplex Bays	Channel Bank Bays	Multiplex Plug-Ins	Cable Facilities
AT&T Interstate Division	$15,879	$ 620	$30,761	$436,531
AT&T Communications of the Mountain States Inc.	195	0	476	2,898
AT&T Communications of New England, Inc.	79	0	451	4,001
AT&T Communications of the Midwest, Inc.	607	206	596	15,517
AT&T Communications of the Pacific Northwest, Inc.	133	3	522	0
AT&T Communications of the Southern States, Inc.	2,231	0	4,964	13,983
AT&T Communications of the South Central States, Inc.	1,262	72	3,405	8,164
AT&T Communications of the Southwest, Inc.	1,642	0	2,178	26,567
Other AT&T Communications Companies **	4,624	157	8,028	63,109
Totals	$26,652	$1,058	$51,583	$570,770

* Estimated construction cost assumes all equipment is ordered as "new". Reuse of existing equipment is made wherever possible. (Figures are sum of April and September filing figures.)

** Includes: AT&T Communications of Maryland, Inc., AT&T Communications of Virginia, Inc., AT&T Communications of Washington, D.C., Inc., AT&T Communications of West Virginia, Inc., AT&T Communications of Illinois, Inc., AT&T Communications of Indiana, Inc., AT&T Communications of Michigan, Inc., AT&T Communications of New Jersey, Inc., AT&T Communications of New York, Inc., AT&T Communications of Ohio, Inc., AT&T Communications of California, Inc., AT&T Communications of Nevada, Inc., AT&T Communications of Delaware, Inc., AT&T Communications of Pennsylvania, Inc., and AT&T Communications of Wisconsin, Inc.

APPENDIX B

INTERSTATE MESSAGES, MESSAGES CIRCUITS AND PRIVATE LINE CIRCUITS AND ANNUAL GROWTH RATES AS REPORTED IN BLANKET APPLICATIONS

	Messages (Billions)		Message Circuits (Thousands)		Private Line (Thousands)		Total Circuits (Thousands)	
	Actual	Growth	Actual	Growth	Actual	Growth	Actual	Growth
1987	16.74	7.2%	735	18.9%	667	18.5%	1402	18.7%
1986	15.62	16.4%	618	10.0%	563	21.2%	1181	15.0%
1985	13.42	0.1%	562	20.3%	465	31.7%	1027	25.2%
1984	13.40	15.9%	467	11.2%	353	16.9%	820	13.6%
1983	11.56	2.7%	420	-0.5%	302	3.4%	722	1.1%
1982	11.25	7.5%	422	-1.2%	292	1.4%	714	-0.1%

1. In Blanket Orders for years prior to 1985, this chart included information as to AT&T's forecasts as well as actual data. Growth was calculated using a geometric progression as follows:

If Po is the latest value of a quantity such as MTS messages obtained from a forecast and P2 was the actual value of the quantity two years earlier then:

$$\sqrt{P2/Po} - 1 = r$$

where r is the annualized average growth over the two year period. The Commission, responding to a request from AT&T, will no longer tabulate actual forecasts. The quantity in the growth column since 1985 is the simple percent growth of the quantity from one year to the next obtained as follows:

$$\text{Growth} = \frac{(\text{Actual in year } i) - (\text{actual in year } i-1)}{(\text{Actual in year } i-1)}$$

2. For the purpose of this table, interstate message circuits are circuits with end points in different states. For years prior to 1987 this information was provided directly by AT&T. For 1987 the number of interstate circuits is not directly available and is estimated as follows:

1987 actual interstate circuits = 1987 actual total circuits * factor where 1987 actual total circuits is from 1989 Blanket and factor = 1987 estimated interstate circuits divided by 1987 estimated total circuits obtained from the 1987 Blanket Application.

3. All data in 1982 and 1983 represent the total number of interstate messages. Beginning in 1984, data reflect the post-divestiture organizational structure and represent AT&T traffic only. Circuit quantities provided by AT&T Communications Interstate Division are comparable to those of the predivestiture Long Lines Dept.

APPENDIX C

AGGREGATE PER TRUNK UTILIZATION FOR AT&T ISD IN CCS

	Actual	Optimum	Estimate
1981	26.0	28.9	27.2-27.7
1982	27.2	29.2	27.3-27.9
1983	28.5	29.4	27.5-28.1
1984	28.7	29.6	27.6-28.2
1985	28.6	30.1	28.2-28.8
1986	27.5	30.5	28.4-29.0
1987	28.5	30.6	28.0-28.6
1988			29.5-30.1
1989			27.1-27.7

Note: Until the 1988 Blanket Application was filed, the actual utilization figures were derived from the AT&T Trunk Administrative Measurement Plan report. By 1988, the network consisted predominantly of Dynamic Non-Hierarchical Routing trunks. Future Blanket Applications will reflect utilization figures from the DTS system.

The optimum is calculated by the Network Forecasting System (NFS) as:

$$\text{Optimum Utilization (CCS)} = \frac{\text{Total carried load}}{\text{Total number of trunks forecast}}$$

APPENDIX D
HISTORICAL MESSAGE
DATA-ACTUALS

(A)
INTERSTATE
MESSAGE TELEPHONE MESSAGES *

YEAR	1982	1983	1984	1985	1986	1987
MESSAGES	6815	6799	6972	6110	7350	7993
CCS	33.53	33.52	33.86	30.80	34.35	37.41

(B)
INTERSTATE
OUTWARD WATS MESSAGES

YEAR	1982	1983	1984	1985	1986	1987
MESSAGES	2532	3092	3586	3758	3805	3639
CCS	6.14	7.63	9.11	9.49	9.52	8.36

(C)
INTERSTATE 800 SERVICE MESSAGES

YEAR	1982	1983	1984	1985	1986	1987
MESSAGES	1904	2325	2845	3553	4462	5105
CCS	4.20	5.11	6.19	7.55	9.72	10.29

(B+C)
TOTAL INTERSTATE WATS MESSAGES

YEAR	1982	1983	1984	1985	1986	1987
MESSAGES	4436	5417	6431	7311	8267	8744
CCS	10.34	12.74	15.3	17.04	19.23	18.66

(A+B+C)
TOTAL INTERSTATE MESSAGES

YEAR	1982	1983	1984	1985	1986	1987
MESSAGES	11251	11563	13403	13421	15617	16737
CCS	43.87	42.46	49.16	47.84	53.58	56.07

* Message volumes are in millions; CCS are in billions.

FOOTNOTES

[1] In past years, AT&T submitted a single blanket application. Its 1989 Blanket Application is in two parts, the first part filed April 25, 1988, and the second filed September 29, 1988. *See* Order and Authorization, 2, FCC Rcd 6733 (1987), (1988 Blanket Order) at paras. 1 and 30, for discussion of filing requirements and AT&T's request for waiver of certain filing rules. No waiver of the filing requirements is necessary here because AT&T has provided, by its two part submission, the information required by our rules.

[2] In addition to the expected construction costs of $649.49 million filed in April, the September filing (completing the Blanket Application) lists an additional $572 thousand for plug-ins.

[3] At the end of 1987, AT&T's plant in service as reported to the Commission on its "Form M" (Annual Report) indicated that plant in service was $21.76 billion. The construction request for 1989 thus represents an incremental expenditure of approximately 3%. (The Form M report for 1987 is the latest available.)

[4] Interstate services are provided by the ISD whereas intrastate services are provided by the following AT&T Companies: AT&T Commmunications of the Mountain States Inc., AT&T Communications of New England Inc., AT&T Communications of the Midwest Inc., AT&T Communications of the Pacific Northwest Inc., AT&T Communications of the Southern States Inc., AT&T Communications of the South Central States Inc., AT&T Communications of the Southwest Inc., AT&T Communications of Maryland, Inc., AT&T Communications of Virginia, Inc., AT&T Communications of Washington, D.C., Inc., AT&T Communications of West Virginia, Inc., AT&T Communications of Illinois, Inc., AT&T Communications of Indiana, Inc., AT&T Communications of Michigan, Inc., AT&T Communications of New Jersey, Inc., AT&T Communications of New York, Inc., AT&T Communications of Ohio, Inc., AT&T Communications of California, Inc., AT&T Communications of Nevada, Inc., AT&T Communications of Delaware, Inc., AT&T Communications of Pennsylvania, Inc., and AT&T Communications of Wisconsin, Inc.

[5] CCS is a term used as a unit for expressing traffic volume. It is an acronym for hundred (C) call seconds. The measurement system used by AT&T for determining utilization is the Trunk Administrative Measurement Plan (TAMP) which measures traffic during the peak busy hour of the year. As was indicated in last year's Blanket Order, TAMP is inappropriate for determining average utilization.

[6] Dynamic Non-Hierarchical Routing is a new means of routing messages within AT&T's network. AT&T has over several years been converting its network to this routing scheme as a replacement for the four level hierarchical routing structure it had previously employed.

[7] *See 1988 Blanket Order* at paras. 13-18.

[8] *See* para. 4 *supra*.

[9] For reference purposes, a summary of channel group and message data over the past several years is shown in Appendix B; historical circuit (trunk) utilization data are shown in Appendix C; MTS, WATS and 800 Service message data listed by actual number of messages and CCS are shown in Appendix D.

[10] AT&T has used this method since we offered the suggestion. *See* Appendix to the Bureau's AT&T Blanket Order and Authorization, File No. W-P-C 5628 (released December 27, 1985).

[11] Generally, differences between one year forecasts and actual data have been less than 5%.

[12] Actual traffic data for a given year do not become available until several months after the end of the calendar year. The latest actual traffic information available in the 1989 Blanket Application (filed April 1988) is for the year 1987.

[13] AT&T has advanced the argument that while individual capacities for DNHR trunks are no greater than for hierarchical trunks, DNHR uses more efficient routing and thus gives superior network utilization. TAMP which AT&T has used in the past (and still uses) measures peak traffic and thus is more likely to give a picture of individual trunk capacities than of utilization. (Capacity of a trunk is the total traffic it can carry in a unit time interval. Utilization is the extent to which capacity is used.) The best network utilization criterion is "average traffic per trunk." Greater average traffic implies greater utilization. A procedure that provides a universally applicable utilization metric, therefore must be based upon data taken over an extended period such as a week or a month. TAMP is not adequate in a network that uses multiple routing techniques. It is possible for DNHR trunks to display utilization figures similar to those of hierarchical trunks during peak periods, but actually carry greater average traffic than the hierarchical trunks. For this reason, AT&T's figures may not actually reflect true utilization.

[14] A "routing structure" is a set of rules which determines the paths that the components of traffic take during busy periods when preferred paths are not available. The object of alternate routing is to maximize traffic handling capability of a network and thus minimize the number of circuits needed in order to obtain a given or objective grade of service. In a hierarchical system, traffic routing is governed by a rigid preset network discipline. In a truly dynamic scheme, routing rules adapt instantaneously to network traffic conditions. DNHR functions on a level that is essentially between these extremes, with routes changing according to expected traffic, but in a predetermined way.

[15] Much of the basic planning and design for ISDN was done by the International Consultative Committee (CCITT), of which AT&T and other United States telecommunications entities are members. ISDN has been in the planning stages for many years but as yet has seen only limited implementation.

[16] *See* 1988 Blanket Order, in which we discussed the implications of these developments, noting that network designers are now confronted with a need to redesign and re-engineer major components of the telephone network to favor transmission and minimize switching.

[17] *See* Midwinter, J. and Smith, P. "Guest Editorial - Photonic Switching", IEEE Journal on Selected Areas in Communications, Vol. 6, No. 7, August 1988.

[18] Coherent modulation is a technique that requires phase correlation between the transmitted carrier and the receiver local oscillator. *See* Linke, R. and Henry, P. "Coherent Communications", Photonic Spectra, Vol 21, Issue 5, May 1987.

[19] *See* Nussbaum, E. "Communications Network Needs and Technologies - A Place for Photonic Switching", IEEE Journal on Selected Areas in Communications, Vol. 6, No. 7, August 1988.

[20] Typically, a trunk busy is recognized by a rapid pulsing busy signal; a subscriber or local loop busy is more commonly experienced by subscribers and is recognized by its longer repetition rate. A subscriber cannot generally ascertain whether a trunk busy signal is caused by congestion at the serving Class 5 central office, the trunks to the Class 4 office, the interexchange trunks, or the destination trunks.

[21] Generally, demand can be expressed in terms of messages or CCS.

[22] AT&T has forecast an approximately 8.9% increase in message volumes for 1989 over 1988. (Supplemental Blanket submission dated August 19, 1988.)

[23] In 1987, AT&T via the Section 214 process applied for authorization of expenditures totaling $1.228 billion. Of this total, $265 million or 21.6% of the total was applied for in the Blanket Application. In 1988 the total was $1.357 billion of which $650 million or 47.9% was via the Blanket Application.

[24] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket 87-313, Report and Order and Second Further Notice of Proposed Rule Making, FCC 89-91, adopted March 16, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 25, 1989

WILLIAMS TELECOMMUNICATIONS GROUP, INC., *et al.* PETITION FOR DECLARATORY RULING.

On April 4, 1989, the Williams Telecommunications Group, Inc., et al. (WTG) filed, pursuant to Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, a petition for declaratory ruling that WTG is an interstate common carrier subject to regulation by the Federal Communications Commission, and that such status is binding on the public and on state instrumentalities, including state courts. Comments may be filed within thirty days of the date of this public notice; reply comments may be filed within 30 days thereafter. Copies of the petition, and comments when filed, may be inspected and copied at the Commission's Public Reference Room, Rm. 6220, 2025 M St. N.W., Washington, D.C., during the hours of 8:30 a.m.- 12:30 p.m. and 1:30 p.m. - 3:00 p.m. Mondays through Thursdays. Such copies also may be purchased from the Commission's duplicating contractor, International Transcription Services, 2100 M St. N.W. Suite 140, Washington, D.C. 20037, telephone (202) 857-3800.

For further information, telephone Olga Madruga-Forti at (202) 634-1855.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMSAT	File Nos. 5545-DSS-MP/ML-87
GENERAL	5546-DSS-MP/ML-87
CORPORATION	5580-DSS-MP/ML-87
	1229-DSS-ML-88

Application for Modification of
COMSTAR D-2, COMSTAR D-4,
SBS-1 and SBS-2 Domestic Fixed-
Satellite Space Station
Construction permits, licenses
and authorizations

MEMORANDUM OPINION AND ORDER

Adopted: April 13, 1989; Released: April 25, 1989

By the Chief, Common Carrier Bureau:

1. Before the Bureau for consideration are the above referenced modification applications filed by Comsat General Corporation (Comsat General) involving the 4/6 GHz COMSTAR D-2 and COMSTAR D-4[1] and the 12/14 GHz SBS-1 and SBS-2[2] domestic fixed satellites. [3] In these applications Comsat General seeks Commission authority to modify the respective licenses to permit the operation of these four satellites with a modified orbit inclination of up to six degrees above or below the equatorial plane of the Earth. This modified orbit inclination is accomplished by using a satellite control technique Comsat General calls the "Comsat maneuver". Pursuant to special temporary authority Safecom[4] is currently operating COMSTAR D-2 and COMSTAR D-4 as a co-located satellite pair at 76^0 W.L. using the Comsat maneuver.[5] Also Comsat General has special temporary authority to operate SBS-1 and SBS-2 as a co-located satellite pair at 99^0 W.L.[6] using the Comsat maneuver.[7] Comments on the COMSTAR D-2/D-4 request were filed by American Satellite Company d/b/a Contel ASC (Contel ASC) and GTE Spacenet Corporation (GTE Spacenet); Comsat General and Hughes Communications Galaxy, Inc. (Hughes) filed a joint statement. Comments on the SBS-1 request were filed by GTE Spacenet and Hughes. Comments on the SBS-2 request were filed by GTE Spacenet. This order resolves the one remaining issue common to the three requests and addressed in the ensuing comments:[8] whether Safecom should be granted regular authority to use the Comsat maneuver when operating COMSTAR D-2/D-4 and whether Comsat General should be granted regular authority to use the Comsat maneuver when operating SBS-1/SBS-2. For the reasons stated below, we grant in part and deny in part the modification requests filed by Comsat General.

BACKGROUND

2. Communications satellites act as radio relay stations in space. Without some compensating mechanism, these stations will drift in orbit due to the gravitational pull from the sun, the moon, and other celestial bodies. To control this orbital drift and to keep the satellites relatively stationary, periodic maneuvers are required that reverse the drift by expending a small amount of fuel. This contains the satellite within a pre-defined east-west and north-south boundary around its nominal orbital location. The total available fuel on board the satellite therefore largely determines the useful lifetime of the spacecraft.

3. In its applications, Comsat General states that the Comsat maneuver is a satellite operational management and control technique which permits satellite lifetime to be extended 5 to 7 years beyond the normal design life.[9] According to Comsat General, during normal operations a satellite uses approximately 90 percent of its stationkeeping fuel for maintaining the inclination of the orbital plane within a small angular deviation (typically | 0.05 to | 0.1 degrees) from the equatorial plane of the Earth. Using the Comsat maneuver, a satellite operator ceases north-south stationkeeping, thus reducing fuel consumption and consequently extending the useful life of the satellite. In order to ameliorate the effects of a total cessation of north-south stationkeeping,[10] the Comsat maneuver includes a periodic correction in spacecraft attitude to achieve a stationary antenna pattern on the surface of the Earth. Comsat General asserts that east-west stationkeeping maneuvers will continue to be performed so that the satellite complies with Commission requirements for maintaining the space station at the assigned orbital location in the geostationary arc. A satellite operated with the Comsat maneuver will appear to move in a "figure eight" pattern every 24 sidereal hours. When in the plane of the geostationary satellite orbital arc, the spacing between satellites will be two degrees. The excursions above and below the equatorial plane of the Earth will increase with time. Comsat General and Safecom request that they be allowed to deviate the orbital inclination of these satellites by up to six degrees.

4. All parties commenting on the efficacy of the Comsat maneuver urge the Commission to condition any grant of such authority on ensuring the protection of current operating satellites and of future satellites. GTE Spacenet, commenting on all three requests (COMSTAR D-2/D-4, SBS-1 and SBS- 2) has no objection in principle to Comsat General using the Comsat maneuver provided that: 1) other domestic satellite licensees' rights are not infringed, 2) satellites adjacent to a satellite which uses the Comsat maneuver are not precluded from using the Comsat maneuver, and 3) operators using the Comsat maneuver be required to comply with all existing or adopted Commission policies regarding the use of the geostationary satellite orbit. Further, GTE Spacenet asserts that new frequency coordinations will be needed for the systems served by both satellite pairs because the earth station antenna elevation angles will vary with satellite inclination, thus increasing the coordination area. Because tracking error may increase with the continuous movement of the satellite pairs through their "figure-eight" motion, GTE Spacenet urges the Commission to require Comsat General and Safecom to certify that its tracking systems can handle the additional load. Also, GTE Spacenet urges the Commission to require Comsat

General and Safecom to maintain sufficient fuel to eject their satellites out of orbit at the end of their operational lives. Finally, GTE Spacenet suggests that the Commission may have to revise or waive its definition of earth station antenna performance requirements in those planes other than the geostationary orbital arc plane.

5. In commenting on the modification request of SBS-1's operation, Hughes basically agreed with GTE Spacenet, adding that any extension of operating authority should be terminated upon Commission determination that the orbit location is needed for a new "state-of-the-art" satellite. Hughes maintains that the Comsat maneuver should not be allowed to prevent more efficient use of the spectrum.[11] Additionally, Hughes asserts that the Commission should determine if the Comsat maneuver causes interference to adjacent satellites and if two adjacent satellites can use the maneuver simultaneously. Finally, Hughes urges the Commission to require Comsat General to discontinue using the Comsat maneuver if any adjacent satellite interference is caused. With regard to the COMSTAR D-2/D-4 request, Hughes and Comsat General filed a joint statement stating that Hughes's Galaxy II (74^0 W.L.) and the COMSTAR D-2/D-4 pair (76^0 W.L.) can be coordinated pending further Hughes/Comsat General discussions.

DISCUSSION

6. International recognition and protection is afforded to geostationary satellites that have been coordinated and notified pursuant to the International Radio Regulations.[12] Under these regulations, satellites that are not operating in geostationary satellite orbit (GSO) can be associated with an orbital location through the notification process, but are viewed as secondary. Thus, they are not eligible for international protection vis-a-vis geostationary satellites. The International Frequency Registration Board (the Board), in its Rules of Procedure, has interpreted the ITU radio regulations to define a geostationary satellite as one operating in geosynchronous orbit with an inclination excursion of five degrees or less.[13] In addition, the international regulations stipulate that any fixed-satellite that is not operating in geostationary satellite orbit may not cause interference into adjacent satellites, may not claim protection from any interference from adjacent geostationary satellites, and is at risk to lose the right to use its orbital location to a satellite operating in the GSO.[14]

7. Comsat and Safecom request that we modify the licenses of their satellites to allow them to operate with inclination excursions of up to six degrees. This is beyond the limits contemplated by the Board and, if permitted, would jeopardize U.S. rights to use the geostationary orbital locations currently assigned to these satellites. Thus, we will not grant the applicants' request as filed.

8. However, we see no reason at this time to prevent the applicants from using the Comsat maneuver with inclination excursions of up to five degrees. All four satellites were efficiently operated for their projected useful lives and three have some additional time remaining on their license terms. There are no pending applications before the Commission to construct and launch new satellites that would be adversely affected by satellites employing the Comsat maneuver. Until other state-of-the-art satellites are ready to be launched into these locations, the public will benefit from the extended useful lives of these older satellites with no accompanying detriment. Finally, we note that Comsat General and Safecom have operated SBS-1/SBS-2 and COMSTAR D-2/D-4 using the Comsat maneuver under STA. During these operations, we have received no complaints from adjacent satellite operators regarding the receipt of unacceptable levels of interference from either of the satellite pairs.

9. Accordingly, we modify the authorizations of SBS-1/SBS-2 and COMSTAR D-4 to permit them to operate with inclination excursions of up to five degrees. COMSTAR D-2 is currently operating under STA beyond its original license term. Under this STA Safecom is also permitted to employ the Comsat maneuver, and therefore no further modification of this STA is necessary. We will not grant Safecom regular authority to operate this satellite using the Comsat maneuver. Nor will we permit a licensee to extend the license term of its satellite simply by ceasing north-south stationkeeping. Once the license term expires, however, we would not be adverse to granting STAs to operators wishing to prolong a satellite's useful life provided that this does not result in detriment to the public. In addition, we emphasize that Comsat and Safecom must continue to operate their satellites pursuant to all existing coordination agreements.[15] Any coordinated levels of interference caused to adjacent satellites as the result of using the Comsat maneuver shall not exceed those coordinated interference levels that would be caused by the satellite operating without the Comsat maneuver. If harmful interference is caused into adjacent satellite or terrestrial operations directly as a result of using the Comsat maneuver, the licensees will be required to cease operations immediately until the difficulty is resolved.[16]

10. With respect to the other concerns raised by commenters, we do not need to determine at this time whether the Comsat maneuver can be used by adjacent satellites. We will address this question when and if it arises. In addition, we will not require SBS-1/SBS-2 and COMSTAR D-2/D-4 to maintain sufficient fuel to eject them out of GSO at the end of their operational lives since this requirement is not currently placed on other satellites. The general question of whether all operators should reserve enough fuel for this purpose will be addressed in a future proceeding.

CONCLUSION AND ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that, pursuant to Section 0.291 of the Commission's rules on delegation of authority, 47 C.F.R. § 0.291, Comsat General Corporation's applications (File Nos. 5545, 5546, 5580-DSS-MP/ML-87 and 1229-DSS-ML-88) ARE GRANTED IN PART AND DENIED IN PART and the authorizations of SBS-1, SBS-2, and COMSTAR D-4 ARE MODIFIED to permit Comsat General Corporation and Safecom Partnership to operate the satellites with an inclination excursion of up to five degrees.

12. IT IS FURTHER ORDERED that authority to operate the satellites with an inclination excursion of up to five degrees is subject to the following conditions:

(a) Comsat General Corporation and Safecom Partnership shall periodically correct the satellite attitude to achieve a stationary spacecraft antenna pattern on the surface of the Earth and centered on the satellite's designated service area.

(b) Comsat General Corporation and Safecom Partnership shall control all interference to adjacent satellites, as a result of using the "Comsat maneuver", to levels not to exceed that which would be caused by the satellite network operating without the "Comsat maneuver."

(c) Comsat General Corporation and Safecom Partnership can not claim protection in excess of the protection that would be received by the satellite network operating without the "Comsat maneuver."

(d) Comsat General Corporation and Safecom Partnership shall maintain the coordination agreement of those terrestrial stations affected as a result of using the "Comsat maneuver."

(e) Comsat General Corporation and Safecom Partnership shall continue to maintain the space station at the authorized longitude orbital location in the geostationary satellite orbital arc with the appropriate east-west stationkeeping tolerance.

13. Comsat General Corporation and Safecom Partnership are afforded thirty days from the date of release of this order to decline the authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] The COMSTAR D-2 satellite was launched in September 1976 and is currently operating under special temporary authority (STA). It has been operating under a series of STAs since its license term expired in 1983. COMSTAR D-4 was launched in February 1981. It is operating on a ten year license which expires in 1991.

[2] SBS-1 was launched in November 1980 and SBS-2 was launched in October 1981. Both are currently operating on ten year licenses which expire in 1990 and 1991 respectively.

[3] Ownership issues regarding these satellites were resolved in earlier orders. *See*, Comsat General Corporation, 2 FCC Rcd 4570 (1987), Comsat General Corporation, 3 FCC Rcd 4071 (1988), and Comsat General Corporation, 3 FCC Rcd 4216 (1988).

[4] Safecom is a general partnership comprised of Loron Corporation (Loron) and Chesnut Ridge Communications, Inc. (Chesnut Ridge). Loron is a wholly-owned subsidiary of Comsat General and Chestnut Ridge is a wholly-owned indirect subsidiary of Timeplex, Inc. (Timeplex) and of Unisys Corporation (Unisys). Safecom is owned by Chestnut Ridge (fifty-one percent) and by Loron (forty-nine percent). The partnership is organized for the purpose of providing digital private-line domestic communications on a common carrier basis.

[5] *See* Letter Authorization from Chief, Domestic Facilities Division to Counsel, Comsat General (April 6, 1989).

[6] SBS-1 and SBS-2 are operating at 99^0 W.L. on temporary authority until the launch of Galaxy-A, which is assigned to this location. At that time, SBS-1 and SBS-2 will be required to move to their assigned location of 75^0 W.L.

[7] Comsat General Corporation, 3 FCC Rcd 4071 (July 1, 1988).

[8] *See* note 3, *supra*.

[9] For current state-of-the-art satellites, the normal design life is approximately ten years. Older satellites, such as COMSTAR D-2/D-4 were designed to have useful lives of approximately seven years.

[10] Cessation of north-south stationkeeping without any other antenna or spacecraft attitude adjustment could result in continuous movement of the satellite antenna pattern on the surface of the Earth.

[11] Contel ASC made this same observation in its comments concerning COMSTAR D-2/D-4.

[12] International Telecommunication Union (ITU), Radio Regulations (RR), Articles 11 and 13.

[13] ITU, RR No. 180 defines a geosynchronous satellite as an earth satellite whose period of revolution is equal to the period of rotation of the earth about its axis. ITU, RR No. 181 defines a geostationary satellite as a geosynchronous satellite whose circular and direct orbit lies in the plane of the Earth's equator and which thus remains fixed relative to the Earth. The inclination excursion is the extent to which the satellite orbital plane is tilted with respect to the equatorial plane of the Earth.

[14] ITU, RR No. 2613.

[15] New coordination agreements may be needed to cover the modified operations depending upon the location of the earth station and the satellite. If new agreements are necessary, the applicants are responsible for obtaining them.

[16] Thus, we need not, as GTE Spacenet suggests, revise or waive our definition of earth station antenna performance requirments in those planes other than the GSO plane. If use of the Comsat maneuver proliferates, however, a change in Part 25 may be necessary.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

August 4, 1988

LICENSEES AND CABLE OPERATORS REMINDED OF LOWEST UNIT CHARGE OBLIGATIONS

As the 1988 general election campaign gets underway, the Commission reminds broadcasters and cablecasters of their obligations to charge candidates the "lowest unit charge" for commercial spots purchased for the upcoming pre-election period and of their obligations to maintain a "political file" containing a complete record of all requests for political air time and a schedule of the time used and charges made. The Commission further reminds broadcasters and cablecasters that failure to comply with these requirements may result in letters of admonition, forfeitures of up to $20,000 or loss of operating authority. Because the Commission has received many inquiries regarding the "lowest unit charge" provision as it applies to time sold on local stations, not networks, this notice is designed to clarify the meaning of that provision in today's marketplace.

THE STATUTE

Section 315(b)(1) of the Communications Act of 1934, as amended, 47 U.S.C. Section 315(b)(1), directs broadcasters (the statute defines broadcast stations to include cable systems) to charge legally qualified candidates for public office "the lowest unit charge of the station" for the *same class* and *amount of time* for the *same period*, during the 45 days preceding a primary election and the 60 days preceding a general or special election (pre-election period). Outside the specified pre-election periods, a station may charge legally qualified candidates as such as it charges others for "comparable use" of the station. 47 U.S.C. Section 315(b)(2).

INDUSTRY SALES PRACTICES

Throughout the years, the Commission's interpretations of the lowest unit charge provision have followed the sales practices of the industry. For example, in 1972, the Commission determined that rate changes during the pre-election periods which occurred as a result of a station's normal business practices, such as changes based upon audience ratings or seasonal variations, were valid bases for price differentials (increases or reductions) *within the same class of time. Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 525 (1972) (*Public Notice*). Also in 1972, the Commission formulated a "fire sale" policy, which provided that a discount on a particular class of spot time earned by a last-minute buyer purchasing a station's inventory during the pre-election period established the lowest unit charge for that class of time throughout the period. *See Public Notice*, 34 FCC 2d at 526.

More recently, the sale of commercial time on a preemptible only basis and the sale of commercials on a weekly rotation throughout dayparts rather than at a particular day and time have given rise to inquiries concerning the applicability of the lowest unit charge provision. Also, the practice of selling non-preemptible or "fixed rate" spots to political candidates has generated certain questions concerning the lowest unit rate provision.

Sale of commercials on a weekly rotation basis occurs where stations offer commercial advertisers spots in a particular time frame (except for network television prime time) to appear any time that week, e.g., stations offer commercial advertisers spots during "Morning News," Monday through Friday, 7:00-9:00 a.m. Under this system, the advertiser knows that the station may schedule the commercials on any of five days, so long as they run within the times indicated in his sales contract.

Another practice is the sale of commercial time on a preemptible basis only. Preemptibility enables the broadcaster to "bump" an advertiser paying a lower preemptible rate in favor of an advertiser paying a higher preemptible rate (effective selling rate). Thus new advertisers paying higher rates can preempt incumbent advertisers paying lower rates. Since both advertisers knew the spots they purchased were preemptible, no reason must be given by the broadcaster for a preemption.

The occurrence of preemptions has lead to the issuing of "make goods" to advertisers. A "make good" is an offer by the station to air or "make good" an advertiser's preempted spot at another, usually later date, in the same daypart as originally purchased, rather than make a refund to the advertiser. These "make goods" typically air within the time frame applicable to the advertiser's schedule (e.g., advertisements for a Memorial Day sale would be "made good" before Memorial Day). Since Congress enacted the lowest unit charge requirement to ensure that candidates are treated as favorably as the most favored commercial advertisers during the pre-election period, the Commission concludes that "make goods" for political spots must air before the election where the licensee would so treat its most favored commercial advertiser when time is of the essence, as noted in the example, above. Of course, the occurrence of a "make good" must be noted in a station's political file. 47 C.F.R. Section 73.1940(d); 47 C.F.R. Section 76.209(d).

Non-preemptible "fixed rate" spots are frequently offered to political candidates only. These rates are higher than prevailing preemptible rates because they guarantee the airing of a spot at a particular time, and are often published at the beginning of the pre-election period on what is known as a political rate card. To avoid the vagaries of preemption, political candidates often choose to pay the higher non-preemptible rate.

CALCULATION OF LOWEST UNIT CHARGES

As noted above, Section 315 (b)(1) directs broadcasters to charge legally qualified candidates for public office "the lowest unit charge of the station" for the *same class* and *amount of time* for the *same period* during the 45 days preceding a primary election, and the 60 days preceding a general or special election (pre-election period). For calculating lowest unit charges, the Commission recognizes

that stations offer two basic classes of time to advertisers: (1) fixed or "non-preemptible" spot time; and (2) preemptible spot time. (The Commission is aware that a few stations also offer "preemptible with notice" time and "run of schedule" time. Preemptible with notice designates an announcement that becomes non-preemptible if not preempted by a certain date, e.g., two weeks before scheduled broadcast. Run of schedule announcements run, if at all, at the convenience of the station, often on a last minute, ad hoc basis. Because these options are rarely offered in today's marketplace the Commission will not discuss them in detail other than to note that if offered they would constitute separate classes of time for purposes of lowest unit rate calculations. Under the statute, broadcasters do not have total discretion to define the classes of time they offer. *Hernstadt v. FCC*, 677 F.2d 893 (D.C. Cir. 1981). There the Court stated: "If broadcasters have total discretion to define 'class of time,' however, they will be free to return to pre-1952 rate discrimination simply by defining a 'political' class of time, with higher rates than other classes, and then offering candidates only 'political' time." *Id.* at 900.

The Commission has been asked whether stations that have established fixed rates or political candidates may increase the rates during the pre-election season. Our answer has been no, unless the rate changes are a result of the station's normal business practices, unrelated to the impending election, such as changes based upon audience ratings changes or seasonal variations. *See Public Notice*, 34 FCC 2d 510 at 525. Thus, subject to these exceptions, established fixed rates must not be increased during the pre-election period.

The Commission considers preemptible spot time as a single class of time for lowest unit charge purposes, even though the rates may change from week to week. Thus, the lowest unit charge for a preemptible class of time is calculated according to the lowest price *any advertiser* has paid for a spot which has "cleared" a particular time period or daypart (e.g., radio drive time or "Morning News," Monday-Friday, 7:00-9:00 a.m. during the week of October 5). This rate may fluctuate, depending upon how the station sells time, whether on a weekly rotation as in most dayparts, or by the program as in prime time. Also, prices paid for "make good" spots aired in this daypart *must be considered* because make goods are an integral part of preemptibility in today's marketplace. Thus, if a station sells preemptible time on a *weekly* rotation basis, and a commercial advertiser's "make good" spot airs during a particular weekly rotation (e.g., 7:00-9:00 a.m.), the price paid for the "make good" spot must also be considered in establishing the lowest unit charge for that time period *during that entire week* of the pre-election period. Any other approach would mean, as a practical matter, that a substantial amount of purchased commercial time would never be calculated for lowest unit charge purposes. For example, in many cases the charge for the make good is below the "going" preemptible rate for that week in the relevant time period. If the candidates were to be charged the "going" preemptible rate for that week, they would be paying more than the commercial advertiser for that class of time. Such a result would be inconsistent with Congress' intent to treat candidates as favorably as the most favored commercial advertisers, who benefit from the make good practice.

Advertising prices in prime time television, as opposed to other dayparts or time periods, may vary from program to program. Thus, many stations sell prime time positions, including adjacencies, on an individual program basis due to the fluctuation in audience ratings. Such individual programs are treated as separate periods of time. Thus, the same principle enunciated above applies where stations sell preemptible time on a program-by-program basis except that the "lowest unit charge" would apply only to the program or adjacency in which the particular spot runs, and the charges for that program could fluctuate weekly. A political candidate buying preemptible spots who pays a higher rate for a particular program than that paid by other preemptible advertisers on the same date will be entitled to a rebate.

The following are applications of the Commission's lowest unit charge interpretations to various hypothetical situations:

(a) *Example I:* A television station sells preemptible time on a weekly rotation basis. A political candidate has paid $100 for each of three 30-second spots to run from 6:00-7:00 p.m. sometime between Monday and Friday on the second week of the pre-election period. One of the spots in the weekly rotation is a commercial advertiser's "make good" spot, for which the latter had paid only $75 because it was preempted from an earlier date. Since the lowest rate any advertiser has paid for spot time that "cleared" the 6:00-7:00 p.m. time period during the week is $75, that ($75) is the lowest unit charge for the preemptible class of time for that time period during the second week of the pre-election period. The political candidate is entitled to a $25 rebate for each spot which was broadcast during the week.

(b) *Example II:* A political candidate buying at the last minute is charged $50 for each of three preemptible 30-second spots to run during a radio station's morning drive time (e.g., Monday-Friday, 6:00-10:00 a.m.), during the sixth week of the pre-election period. A commercial advertiser has been paying $40 for each of three preemptible 30-second spots during morning drive time on a six week schedule that started during the first week of the pre-election period. If the $40 price paid by the commercial advertiser is the lowest rate paid by any advertiser for a 30-second preemptible spot during morning drive time in the sixth week of the pre-election period, the political candidate is entitled to a rebate of $10 for each of the three spots.

(c) *Example III:* A political candidate has paid $750 for a nonpreemptible fixed rate spot to air adjacent to a television station's highest rated prime-time show. A commercial advertiser's preemptible spot, for which the advertiser had paid $450, airs adjacent to the same show. The candidate is not entitled to a rebate from the station, because the lowest unit charge for the fixed rate class of time during that particular show was $750.

The Mass Media Bureau's Political Programming Branch can answer questions in this area and is responsible for processing complaints and resolving controversies. Its telephone number is (202) 632-7586.

Action by the Commission August 4, 1988. Commissioners Patrick (Chairman), Quello and Dennis, with Commissioner Dennis issuing a separate statement.

FEDERAL COMMUNICATIONS COMMISSION

SEPARATE STATEMENT
OF
COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Public Notice Reminding Licensees and Cablecasters of Their Political Programming Obligations

I am voting for this item because it clarifies the complex subject of how to interpret Section 315. Political advertising is an area where broadcasters and cable systems on the one hand, and candidates on the other, must work together under tight time pressure. It's important to set out clear ground rules for both sides. In light of this Public Notice, three rules, at least, will be clear:

First, lowest unit rate will be determined on a week-to-week basis. This policy recognizes that the price of broadcast advertising can vary dramatically from week to week.

Second, we are putting broadcasters and cable systems on notice that "make goods" must be considered in determining the lowest unit rate. This result is clearly contemplated by Section 315, and it follows logically from earlier Commission statements on volume discounts, long-term contracts, and bonus spots.

Third, we are formally recognizing all preemptible spots as a single class of time. This decision settles a long-standing dispute between broadcasters and candidates as to what constitutes a "class" of time. A strong argument can be made to treat each category of preemptible time as a separate class. Nevertheless, because Section 315's underlying purpose is to ensure that candidates for office have an affordable means of reaching the electorate, I am voting to treat preemptible spots as a single class.

I am pleased that we are able to release this Public Notice in August, more than three months before the general election. I hope this will give candidates and stations the opportunity to prepare with more certainty for the political advertising season.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company
Revisions to Tariff F.C.C. No. 1

Transmittal No. 231

ORDER

Adopted: April 17, 1989; Released: April 21, 1989

By the Chief, Common Carrier Bureau:

1. On March 8, 1989, the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West) filed the captioned tariff revisions which propose individual case basis (ICB) rates and charges for five DS3 high capacity service cases, as well as three cases to remove certain expired services. The proposed revisions were originally scheduled to become effective on April 12, 1989, but the effective date was subsequently deferred to June 6, 1989. On April 10, 1989, US West filed additional revisions to its tariff that propose a generalized rate structure for DS3 service.[1]

2. On April 10, 1989, US West filed an application for special permission in which it requests waiver of Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, in order to advance the effective date of the captioned tariff revisions.[2] US West proposes to alter DS3 services filed in Transmittal 231 to reflect the rates and charges proposed in Transmittal 239 and to advance the effective date of Transmittal 231 on not less than one day's notice. US West further seeks to accommodate customers who have requested DS3 service with a service date prior to the scheduled May 25 effective date of Transmittal 239.

3. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of local exchange carriers' (LEC) proposed ICB rates, designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings. [3] The offerings proposed in Transmittal 231 raise the same issues as those transmittals subject to our *Designation Order*. Therefore, the instant transmittal will be subject to the outcome of that investigation. In view of the fact that US West has made the proposed ICB rates consistent with its pending generalized filing, we will grant its application and allow it to advance the effective date of the proposed revisions on not less than one day's notice.

4. Accordingly, IT IS ORDERED that the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company Tariff F.C.C. No. 1, Transmittal 231, is subject to the investigation instituted in CC Docket No. 88-136.

5. IT IS FURTHER ORDERED that the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company may file tariff revisions, as requested in Application No. 92, to be effective on not less than one day's notice, in order to advance the effective date of the above-referenced transmittal. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 89-288.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions are suspended for one day.

7. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company shall keep accurate account of all amounts received pursuant to rates for DS3 services filed under Transmittal 231.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company, Tariff F.C.C. No. 1, Tr. No. 239, filed Apr. 10, 1989.

[2] Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company, Application No. 92, filed Apr. 10, 1989.

[3] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (1988) (*Designation Order*). *See also* Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (1988); Public Notice, Network Communications, Inc., Files Comments on Individual Case Basis Rates for DS3 Services, CC Docket No. 88-136, 4 FCC Rcd 846 (1989). The Bureau is also investigating certain generalized DS3 rate structures which took effect on April 1, 1989. *See* Annual 1989 Access Tariff Filings, Memorandum Opinion and Order, DA 89-337, released Mar. 22, 1989, at paras. 537-539.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

April 18, 1989

ADVISORY COMMITTEE ON ADVANCED TELEVISION SERVICE IMPLEMENTATION SUBCOMMITTEE MEETING

A meeting of the Implementation Subcommittee of the Advisory Committee on Advanced Television Service will be held on:

May 9, 1989
1:00 P.M.
Commission Meeting Room (Room 856)
1919 M Street, N.W.
Washington, D.C.

The agenda for the meeting will consist of:

1. Introduction
2. Approval of Minutes of Last Meeting
3. Report of Working Party 1
   Policy and Regulation
4. Report of Working Party 2
   Transition Scenarios
5. General Discussion
6. Other Business
7. Date and Location of Next Meeting
8. Adjournment

All interested persons are invited to attend. Those interested also may submit written statements at the meeting. Oral statements and discussion will be permitted under the direction of the Implementation Subcommittee Chairman.

Any questions regarding this meeting should be directed to Dr. James J. Tietjen at (609) 734-2237 or David R. Siddall at (202) 632-6460.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE SPACENET CORPORATION — File No. I-T-C-86-103

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules, to extend its existing satellite services to points in the U.S. and the Caribbean.

RCA AMERICAN COMMUNICATIONS, INC. — File No. I-T-C-85-147

For authority pursuant to Section 214 of the Communications Act to provide satellite services between the United States and certain specified Caribbean and Latin American locations.

WESTERN UNION TELEGRAPH COMPANY — File No. I-T-C-83-136

For authority pursuant to Section 214 of the Communications Act to utilize Westar satellite capacity for communication between various points in the United States and points in Mexico, Costa Rico, Haiti, Dominican Republic, and Belize.

WESTERN UNION TELEGRAPH COMPANY — File No. I-T-C-83-139

For authority pursuant to Section 214 of the Communications Act to utilize Westar satellite capacity for communication between various points in the United States and points in the Bahamas, Bermuda. British Virgin Islands, Cayman Islands, Jamaica and St. Kitts-Nevis.

WESTERN UNION TELEGRAPH COMPANY — File No. I-T-C-86-104

For authority pursuant to Section 214 of the Communications Act to use Westar satellite capacity for communication between the United States and the Bahamas.

RAINBOW NETWORK COMMUNICATIONS — File No. I-T-C-85-092

Application for authority pursuant to Section 214 of the Communications Act to offer common carrier satellite lines of communication between earth stations in the United States and in the Caribbean via the RCA Satcom, Hughes, GTE, Western Union Westar and SBS Systems.

RAINBOW NETWORK COMMUNICATIONS — File No. 889-DSE-ML-85

Application for modification of its license for a fixed transmit/receive satellite earth station (WL94) at Belmont, New York to permit communications with the Satcom, Hughes, GTE, Westar and SBS systems for service between the United States and Caribbean locations.

SOUTH STAR COMMUNICATIONS, INC. — File No. I-T-C-86-089

Application for authority pursuant to Section 214 of the Communications Act to extend existing services to transborder locations.

SOUTH STAR COMMUNICATIONS, INC. — File No. 1140-DSE-ML-86

Application for modification of its domestic license for a fixed satellite earth station (E8846) at Davie, Florida, to permit communications with the Canadian ANIK satellite series.

John Michael Garner, d/b/a TELE-LINK, INC. — File No. I-T-C-86-129

For authority pursuant to Section 214 of the Communications Act to extend domestic satellite communications service to transborder locations.

E. Vernon Oliver & John Michael Garner d/b/a TELE-LINK, INC. — File No. I-T-C-86-130

For authority pursuant to Section 214 of the Communications Act to extend domestic satellite communications service to transborder locations.

RCA AMERICAN COMMUNICATIONS, INC. — File No. I-T-C-87-040

For authority pursuant to Section 214 of the Communications Act of 1934, as amended, to make available television channels of communication via the RCA Americom satellite Satcom K-2 for occasional service from various points in the Caribbean and Central America to the United States.

ERRATUM

Released: April 19, 1989

By the Commission:

1. The Commission's Memorandum Opinion and Order, FCC 89-66, released March 2, 1989 in the above-captioned matter is hereby corrected to reflect that the application of RCA American Communications, Inc., File No. I-T-C-87-040, involves one-way video service from Latin American/Caribbean locations to the United States and not two-way service as stated in the Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for Waivers of Part 90 of the Commission's Rules by the County of San Bernardino to Operate a County-Wide Public Safety Communication System in the 800 MHz Band	File Nos. 569744-569750

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: April 13, 1989; Released: April 26, 1989

By the Commission:

INTRODUCTION

1. We have before us a Petition for Clarification (Petition), filed October 17, 1988, by the National Association of Business and Educational Radio, Inc. (NABER). NABER's petition concerns the Private Radio Bureau's *Order*[1] and our subsequent *Memorandum Opinion and Order* [2] granting the request of the County of San Bernardino, California for waivers of certain provisions of Part 90 of the Commission's Rules to establish an 800 MHz county-wide public safety communications system on frequencies offset 12.5 kHz (offset frequencies) from regularly assignable channels.[3]

2. While NABER does not now oppose the conditional waivers granted to the County, it requests clarification of two aspects of our decision. First, NABER asks for the establishment of a cut-off date for the County to finalize its selection of frequencies within the non-public safety pools. Second, NABER questions whether it may presume that it is acceptable for new base stations to be located at existing sites and to operate on frequencies offset from those used by the County. Petition at 4-6. Each of these issues will be discussed in detail below.

BACKGROUND

3. In the initial *Order*, the Bureau granted the County a waiver of certain provisions of Part 90 of our Rules to operate a county-wide public safety communications system. Specifically, the waiver permitted the County to implement a trunked system on offset frequencies reserved for conventional use in both public safety and non-public safety frequency pools.[4] The waiver was conditioned on the County resolving any interference to existing licensees.[5]

4. In response to several petitions for reconsideration of the *Order*, we issued a *MO&O* that required the County to conduct tests to ensure that existing base station operators are protected from interference; to protect present and future add-on users of existing base stations and successors-in-interest to existing systems; and to exhaust public safety offset frequencies before resorting to frequencies in non-public safety pools. In the *MO&O*, we also stated our expectation that the County would participate in the formulation of the National Public Safety Plan[6] and seek spectrum in the 821-824/866-869 MHz band as an eventual substitute for channels offset from non-public safety frequencies.[7]

5. Our *MO&O* also provided that any authorization granted to the County for use of non-public safety frequencies would be made initially on a developmental basis to assure that the County corrects or eliminates interference caused to existing non-public safety base stations before receiving permanent licenses. All add on users, whether added during the pendency of the developmental license or after permanent licensing, must be protected from interference by the County. If the County fails to eliminate interference, the County's operations could be terminated. If, however, the County's system experiences interference from existing licensees, the County has no recourse against them.

DISCUSSION

6. NABER first requests that we establish a cut-off date for the County to finalize its selection of frequencies within the non-public safety pools. NABER suggests that the date should be within six months of the date that an *Order* is issued in response to its Petition. Petition at 4. NABER contends that a cut-off date is necessary so that NABER can begin coordinating frequencies and protect those authorized to the County.

7. In response to this point, we note that the County has submitted applications with the associated requests for waiver to use offset frequencies to construct its public safety system. The applications now on file with us represent the County's current request and planned frequency use and site locations for its system. Using the information contained in the County's currently pending applications, NABER can now begin coordinating frequencies in the San Bernardino area. Thus, there is no need to establish a cutoff date.

8. NABER also requests that the Commission allow new base stations to be located at existing sites where licensees now operate on frequencies adjacent to the County's and to use frequencies offset from those of the County. Petition at 5. In support, NABER notes that the interference protection conditions set forth in the *MO&O* appear to preclude certain use of adjacent channels at certain locations where protection is unnecessary. NABER asserts that if a particular base station does not experience interference at a location, then the same result can be expected by locating other base stations at the same site. Petition at 5. Fundamental to NABER's position is the assumption that new stations will not create additional interference to the County's system because the County has either taken action to prevent it or accepted any interference from existing operations.

9. As previously observed, under its developmental license the County is required to resolve any harmful interference it causes to existing licensees.[8] The County is also required to accept any interference it receives from existing licensees' operations.[9] The County, however, will not be required to protect or to accept harmful interference from a new base station constructed at a site where an existing licensee is already operating.

10. Constructing additional base stations using frequencies offset from the County's and at sites where existing licensees are operating may not cause additional interference to the County's system. This, however, cannot just be assumed. Each new base station using a frequency adjacent to the County's, despite being located at an existing site, creates a greater potential for interference to the County's system. Construction of additional base stations at existing sites can be added, therefore, only after a careful examination of the potential for interference through the frequency coordination process. If, in this regard, it is determined that an additional base station can be constructed at an existing site, the coordinator can so recommend to the Commission. The County could not, of course, have anticipated additional interference to its operations from such a new station when designing its system. It must be emphasized, therefore, that the burden would be on a new licensee to protect the County's system from interference and to take immediate steps to resolve any such interference caused if construction is permitted at an existing site. The County, moreover, is under no obligation now or in the future to protect any such new system from interference.

11. Accordingly, pursuant to Sections 1.401 and 1.407 of the Commission's Rules, IT IS ORDERED that NABER's petition IS GRANTED to the extent stated above and IS DENIED in all other respects.

12. It is FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Request for Waivers of Part 90 of the Commission's Rules by the County of San Bernardino to Operate a County-Wide Public Safety Communication System in the 800 MHz Band, 2 FCC Rcd 6721 (1987) (*Order*).

[2] Request for Waivers of Part 90 of the Commission's Rules by the County of San Bernardino to Operate a County-Wide Public Safety Communication System in the 800 MHz Band, 3 FCC Rcd 6033 (1988) (*MO&O*).

[3] When licensees operate on offset channels, they are using channels centered between regularly assignable channels. The regularly assignable channels are spaced 25 kHz apart in the band in question, which results in the offset channels being spaced 12.5 kHz away from the regularly assignable channels. *See generally* 47 C.F.R. § 90.613.

[4] *See* 47 C.F.R. § 90.617.

[5] *Order*, 2 FCC Rcd 6721, at para. 6.

[6] *Report and Order*, Development and Implementation of a Public Safety National Plan and Amendment of Part 90 to Establish Service Rules and Technical Standards for Use of the 821-824/866-869 MHz bands by the Public Safety Services, General Docket No. 87-112, 3 FCC Rcd 905 (1987), *Erratum*, released January 6, 1988 (DA 87-1869).

[7] *Memorandum Opinion and Order, supra* note 2 at para. 17.

[8] *See* 47 C.F.R. § 90.515 (stating grant of developmental license subject to change of terms or cancellation without hearing).

[9] 3 FCC Rcd 6033 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 26, 1989

PLEADING CYCLE ESTABLISHED FOR BELL ATLANTIC PETITION FOR RULE MAKING ON PAY TELEPHONES RM-6723

On April 14, 1989, Bell Atlantic filed a petition for Rule Making proposing an equal access plan for all pay telephones in equal access areas. Under Bell Atlantic's proposed plan, all interexchange calls dialed on a 0+ basis (*i.e.*, "0" plus an interexchange number) from pay telephones in equal access areas would be routed to the carrier determined by the party to be billed for the call. According to Bell Atlantic, the United States District Court administering the Modification of Final Judgment (MFJ) has directed the Bell Operating Companies (BOCs) and GTE to work toward implementing this routing methodology (hereinafter "billed party preference") on their own payphones. Bell Atlantic states that if billed party preference is not implemented on all other payphones as well, including independent telephone company and privately owned payphones, BOC payphones will ultimately be replaced by non-BOC payphones, thereby undermining the equal access provisions of the MFJ. Bell Atlantic claims, further, that patchwork implementation of billed party preference will lead to consumer confusion.

Bell Atlantic states that in the near term, billed party preference would increase call processing time for collect, third party, and calling card calls by one-half to four seconds. It states that this delay will be eliminated by 1993 with widespread implementation of common channel signaling system 7 (CCS7) interfaces with interexchange carriers (IXCs) and the deployment of CCS7 at tandems and operator switches. Bell Atlantic notes also that, in the short term, billed party preference would require customers of an IXC that validates its own 0+ traffic to interface with two operator systems -- the local exchange carrier (LEC) operator system (which determines the IXC that will receive the call), and the IXC operator system (which validates the call). According to Bell Atlantic, this problem, as well, could be resolved by 1993, when LECs will have the ability to supply to IXC operator systems the information callers provide to LEC operator systems.

Bell Atlantic states that, in light of these considerations, the Commission may wish to defer implementation of mandatory billed party preference until these technical problems are resolved. Nevertheless, Bell Atlantic urges the Commission to rule on its petition as soon as possible, so that it may either proceed with implementation of billed party preference or petition the MFJ court for modification of the Court's order directing BOCs to proceed with the development of this system.

Interested parties may file comments on Bell Atlantic's petition on or before **May 26, 1989,** and reply comments on or before **June 23, 1989.** Comments and reply comments must be filed with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554 and should reference RM-6723, the Rule Making number assigned to this proceeding. A copy of all filings should be sent to Gary Phillips, FCC, Room 544, 1919 M Street, N.W., Washington, D.C., 20554, and to the Commission's contractor for public records duplication, International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of Bell Atlantic's petition can be obtained from ITS by calling (202) 857-3800.

For further information, contact Gary Phillips, Policy and Program Planning Division, Common Carrier Bureau, (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

2001 Enterprises, Inc., File No. ENF-88-10

ORDER

Adopted: April 14, 1989; Released: April 18, 1989

By the Chief, Common Carrier Bureau:

1. On October 8, 1987, the Commission received a complaint alleging apparent violations by 2001 Enterprises, Inc. (2001 Enterprises), of Section 223(b) of the Communications Act, 47 U.S.C. § 223(b), as it existed at the time the apparent violations occurred, relating to adult-oriented telephone messages being transmitted over telephone lines leased to 2001 Enterprises.

2. On March 28, 1988, the Common Carrier Bureau (Bureau) sent a letter of inquiry to Nancy Rogers, President of 2001 Enterprises, who responded on May 23, 1988. Since the Response, 2001 Enterprises and its president, Nancy Rogers (hereinafter "parties"), have engaged in negotiations with the Bureau to produce a fair and expeditious resolution of the above-captioned proceeding in a manner that would serve the public interest. The Bureau and the parties have reached an agreement, the terms and conditions of which are contained in the attached Consent Decree. We believe that the public interest would be served by adopting the Consent Decree, the terms of which are hereby incorporated herein by reference.

3. Accordingly, IT IS ORDERED that the Consent Decree, incorporated by reference herein, is hereby adopted.

4. IT IS FURTHER ORDERED that 2001 Enterprises and Nancy Rogers shall abide by the terms and conditions of the Consent Decree.

5. IT IS FURTHER ORDERED that the proceeding against 2001 Enterprises is hereby terminated.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

ATTACHMENT

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

2001 Enterprises, Inc., File No. ENF-88-10

CONSENT DECREE

1. On October 8, 1987, the Commission received a complaint alleging apparent violations by 2001 Enterprises, Inc. (2001 Enterprises), of Section 223(b) of the Communications Act, 47 U.S.C. § 223(b), relating to sexually-explicit telephone messages being transmitted over two telephone numbers ((213) 976-2001 and (213) 976-3473) leased to 2001 Enterprises. On March 28, 1988, the Common Carrier Bureau (Bureau) sent a letter of inquiry to Nancy Rogers, President of 2001 Enterprises, who responded through counsel on May 23, 1988. In addition, on September 16, 1988, the Bureau issued a subpoena ordering 2001 Enterprises to produce information with respect to the involvement of individual company employees or officers in committing the apparent violations in order to determine whether forfeitures against individual employees or officers would be ordered. By agreement between the parties, that subpoena was not responded to pending negotiations regarding this Consent Decree.

2. For purposes of this Consent Decree, the following definitions apply:

a. "Common Carrier Bureau (Bureau)" means the Common Carrier Bureau of the Federal Communications Commission;

b. "2001 Enterprises" means the corporate defendant or any officer, director, or any shareholder acting on behalf of 2001 Enterprises in the proceeding that is the subject of this Consent Decree;

c. "Nancy Rogers" means Nancy Rogers as an individual and as a corporate officer, director, employee, or controlling shareholder of either 2001 Enterprises or any other corporation;

d. "Final Order" means an order of the Bureau adopting the terms and conditions of this Consent Decree and formally disposing of the above-captioned proceeding against 2001 Enterprises;

e. "Section 223(b)" means Section 223(b) of the Communications Act and any applicable regulations in force on the dates of the violations alleged by the complaint. Section 223(b) prohibited the interstate transmission of obscene or indecent messages for commercial purposes to persons under the age of 18 and provided that the Commission adopt a regulation permitting certain defenses to prosecution. "Section 223(b) as amended" refers to all amendments that have been or will be made to Section 223(b) subsequent to the dates of the violations alleged in the complaint;

f. "Message services" means the business of providing to a caller via telephone, either recorded messages or live conversations;

g. "Sexually-explicit" message services are communications that are obscene or indecent within the meaning given the terms obscene or indecent contained in Section 223(b) or Section 223(b) as amended;

h. "Effective date of this Consent Decree" is the date that the Final Order is released.

3. 2001 Enterprises and Nancy Rogers admit the jurisdiction of this Commission over them and over the subject matter of this action for the purposes of this Consent Decree and any Final Order.

4. 2001 Enterprises and Nancy Rogers agree that the provisions of this Consent Decree shall be incorporated by reference in any Final Order, as described in paragraphs 8 and 11 below.

5. 2001 Enterprises and Nancy Rogers waive any rights they may have to appeal any Final Order, as described in paragraph 8 and 11 below.

6. 2001 Enterprises and Nancy Rogers represent as follows: 2001 Enterprises stopped providing sexually-explicit recorded message services over the telephone numbers (213) 976-2001 and (213) 976-3473 prior to June 1, 1988. As of June 1, 1988, Nancy Rogers was not an officer, director, or employee of any entity offering sexually-explicit message services and held no interest, financial or otherwise, in such an entity.

7. In consideration for the termination by the Bureau of this proceeding in accordance with the terms of this Consent Decree, 2001 Enterprises and Nancy Rogers agree to the following terms, conditions and procedures that the parties believe will facilitate a fair and expeditious resolution of the above-captioned proceeding in a manner that would serve the public interest. 2001 Enterprises and Nancy Rogers agree to the following terms, conditions and procedures without admitting any of the alleged violations set forth in the complaint and without admitting that either has provided messages that are obscene or indecent.

a. 2001 Enterprises and Nancy Rogers agree to pay, without further protest, or recourse to a trial *de novo*, $25,000 within 30 days of the date the Final Order is released.

b. 2001 Enterprises and Nancy Rogers agree not to operate any sexually-explicit message services in the future. It is expressly agreed that compliance with this subparagraph imposes an obligation separate and apart from any obligation of 2001 Enterprises and Nancy Rogers to comply with Section 223(b) as amended or other laws or regulations that may in the future govern the provision of sexually-explicit message services. Compliance with the terms of this Consent Decree shall not in and of itself constitute a defense to any action brought under the terms of Sections 223(b) as amended or other laws or regulations that may in the future govern the provision of sexually-explicit message services. It is further agreed that nothing herein shall limit the authority of the Commission to enforce Section 223(b) as amended, or other laws or regulations that may in the future govern the provision of sexually-explicit message services, for activities engaged in by 2001 Enterprises or Nancy Rogers after June 1, 1988.

c. 2001 Enterprises and Nancy Rogers further agree to file a report every six months for the next five years, commencing six months from the effective date of this Consent Decree, advising the Commission of the telephone numbers that each of them, together or separately, is using, or has used during the six month period prior to the report, for the purpose of providing message services.

8. In light of the covenants and representations contained in paragraphs 3-7, *supra*, and in express reliance thereon, the Bureau agrees to accept this Consent Decree and to issue a Final Order terminating this proceeding against 2001 Enterprises, without any finding of liability on the part of 2001 Enterprises or Nancy Rogers.

9. 2001 Enterprises and Nancy Rogers agree that any violation of the Final Order shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

10. The parties further agree that the effectiveness of this Consent Decree and the termination of the above-captioned investigation shall become effective on the date of the release of a Final Order as described herein.

11. The parties agree that if the Commission brings an action in United States District Court to enforce the terms of the Final Order, 2001 Enterprises and Nancy Rogers agree that they will not contest the validity of the Final Order, will waive their statutory right to a trial *de novo* and will consent to a judgment incorporating the terms of this Consent Decree.

Gerald Brock
Chief, Common
Carrier Bureau

Nancy Rogers
2001 Enterprises, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-376

In the matter of

Amendment of the Commission's Rules	RM-5532
to improve the quality of the AM	RM-6174
Broadcast Service by reducing	
adjacent channel interference and by	
eliminating restrictions pertaining	
to the protected daytime contour.	

FIRST REPORT AND ORDER

Adopted: April 12, 1989; Released: April 27, 1989

By the Commission: Commissioner Dennis issuing a separate statement.

INTRODUCTION

1. The *Notice of Proposed Rule Making* [1] *(Notice)* in the above captioned matter proposed two changes in the technical rules governing the standard broadcast (AM) service. This Order addresses one of these proposals: the matter of adjacent channel emission limits. The other proposal, the elimination of the "first service" provision in Section 73.37(b), will be treated in a subsequent Second Report and Order. After carefully considering the comments and reply comments filed in response to the *Notice*,[2] the Commission herein adopts the National Radio Systems Committee (NRSC) emission limitation (commonly known as "NRSC-2") as a new AM broadcast station standard. However, until June 30, 1994, stations employing the NRSC audio pre-emphasis standard (commonly known as "NRSC-1") will be presumed to comply with NRSC-2 in the absence of specific information to the contrary.

BACKGROUND

2. The *Notice* discussed AM adjacent channel interference, AM audio processing practices and their effects on the quality of the AM broadcast service.[3] It presented two new standards developed by the National Radio Systems Committee, a cooperative effort of the NAB and EIA. These standards are intended to reduce the current occupied RF bandwidth of AM broadcast transmitters from 30 kHz to a nominal 20 kHz to achieve a reduction in interference levels and to improve the reception quality of the AM service.

3. One of the standards, known as NRSC-1, is an audio processing standard that specifies a particular pre-emphasis[4] characteristic (i.e., an increase in amplitude relative to the reference frequency[5]) for audio frequencies between 3.0 kHz and 9.5 kHz. However, it requires great attenuation of audio frequencies above 10 kHz in order to reduce adjacent channel interference. Because of inherent shortcomings associated with use of NRSC-1 alone, we specifically declined proposing to mandate its use in the *Notice*.

4. The other standard, known as NRSC-2, defines a new emission limitation for AM stations. Because we believe NRSC-2 to be the more comprehensive of the two standards in terms of ensuring a reduction in adjacent channel interference, it was the principal focus of the *Notice* and was specifically proposed for adoption. However, we did seek comment on a "presumptive compliance" alternative in which licensees using NRSC-1 pre-emphasis would be presumed to comply with the NRSC-2 emission limitation, absent any evidence to the contrary.[6] The comments and reply comments to the *Notice* further support our preliminary findings and convince us that our initial approach, adoption of the NRSC-2 emission limitation, remains the more effective course of action.

5. To provide a foundation for the analysis to follow, consider a typical AM transmission system. Program material originates at a microphone, turntable or other appropriate source. It is then fed through a mixing console (so that the loudness of each audio source can be adjusted and so that any special effects can be added), various audio processing equipment (used to adjust the average loudness and often, the average frequency response), some type of studio-transmitter link (a simple cable, if the transmitter is nearby, or a dedicated wireline or radio circuit), additional audio processing equipment (used to compensate for any degradation occurring in the studio-transmitter link) and finally, the transmitter modulator. Equipment having the NRSC-1 audio response characteristic could be included anywhere in this audio "chain," although it would preferably be located near the end, where its intended benefits could not be circumvented by compensatory adjustments made to subsequent audio processing equipment.

6. To reduce the potential for overmodulation, transmitters may include built-in or outboard protective circuits called limiters or clippers, many of which are adjustable to limit transmitter modulation to a specific level. However, in this limiting process, some audio distortion is generated, creating harmonically-related audio signal components that can be outside of the desired audio passband. If these undesired audio signal components are not adequately attenuated by post-clipper or post-limiter filtering circuits, they will produce unwanted spurious RF sidebands (known as "splatter") that may exceed the permissible emission limits.[7] Splatter could also be produced by nonlinearities in transmitter or antenna circuits.[8] Old tubes that have become defective and improper neutralization are other causes of splatter.

7. The preceding technical considerations must be kept in mind when evaluating the relative merits of the NRSC-1 and NRSC-2 technical standards. The fundamental premise of the *Notice* was that application of the emission limitation standard (NRSC-2), being a measure of the entire transmission system output, was a much more comprehensive method of limiting interference than application of an audio standard (NRSC-1), the effectiveness of which could be reduced by the operation of other circuits.

SUMMARY OF THE COMMENTS

Comments generally favoring adoption of NRSC-1

8. In general, commenters support both the NRSC-1 and the NRSC-2 standards. However, most want the Commission to implement the NRSC-1 audio standard now but delay implementation of the NRSC-2 emission standard until January 1, 1992. AFCCE supports this NRSC-2 implementation date, saying that "compliance with (NRSC-2) may not be possible for all AM broadcast transmitters in operation. AM licensees having such transmitters have no alternative other than to retire the transmitters from service, regardless of the age or condition of the equipment."[9]

9. There is also concern about compliance costs associated with NRSC-2 versus NRSC-1. SBE notes that implementation of NRSC-1 typically would cost licensees between $400 and $700. However, it indicates that the current emission limitations "are so lenient that there is now little need for stations to carefully measure their occupied bandwidth. In contrast, if the NRSC-2 standard is adopted, a station would be prudent to employ an RF spectrum analyzer, a "splatter" monitor, or a similar device capable of quantitatively measuring the occupied bandwidth rather than relying on less precise methods (e.g., a careful listening test for excessive sideband energy using a high-quality receiver)."[10] SBE further indicates that while most licensees already have the conventional audio equipment necessary to verify compliance with NRSC-1, they do not have equipment to verify compliance with NRSC-2. NAB notes that audio filters necessary to ensure compliance with NRSC-1 are more economical than the RF filters that may be required to comply with NRSC-2.[11]

10. The commenters mention additional reasons for adopting NRSC-1. To date, only about 20% of AM licensees have implemented NRSC-1 as a voluntary audio standard. This may be due to the fact that NRSC-1 audio pre-emphasis will generally limit emitted bandwidth by reducing the treble or brightness of a station's sound. Because there is some perception that this is undesirable (unless everyone else does it), SBE notes that many licensees don't want to be the first in their market to make such a change.[12] Mandating the use of NRSC-1 is seen as a way of resolving this dilemma. SBE notes that "Mandatory adoption (of NRSC-1) by January 1, 1990, would send an unmistakable message to receiver manufacturers. Implementation of the receiver portion of the NRSC-1 standard, a complementary de-emphasis curve for receivers, would no longer be a gamble for receiver manufacturers."[13]

Comments generally favoring adoption of NRSC-2

11. However, other commenters support the preliminary findings set forth in the *Notice* and agree that our initial approach, adoption of the NRSC-2 emission limitation standard, would be the most effective way to alleviate adjacent channel interference. They agree with the *Notice* that NRSC-1 could easily (even if inadvertently) be circumvented. These commenters also dismiss some of the above concerns as being largely unfounded.

12. For example, on the matter of transmitters' ability to comply with NRSC-2, Orban notes that "In developing NRSC-2, the (NRSC) wished to create a standard that could be met by any acceptable broadcast transmitter in perfect working order, fed by NRSC-1 processed audio."[14] Group W, which favors immediate adoption of both the NRSC-1 and NRSC-2 standards, indicates that "After adopting the NRSC-1 audio standard, the NRSC proceeded to evaluate the effectiveness of that audio standard after it passed through the transmitter. Analysis of broadcasting stations employing NRSC-1 led to a standard for the occupied bandwidth of the station at the output of the transmitter. Changes were made in the standard to accommodate various modulation schemes and older transmitters."[15]

13. Delta rebuts allegations that some transmitters may become obsolete by stating, "A broadcaster operating an AM station in reasonable repair should not fear the proposed RF mask.[16] There should be no need for a new transmitter."[17] Delta further supports that statement, based upon experience with a variety of broadcast transmitters, by stating: Delta has installed over 180 C-QUAM AM stereo systems to date. Over half of these were installed on transmitters which were at least 5 years old and several were over 20 years old. All of these AM stereo systems have been successfully installed and adjusted without ever requiring transmitter replacement. Generally, only minor tuning and transmitter neutralization was required with occasional replacement of aged modulator tubes. This extensive experience demonstrates that even older transmitters will easily meet the stringent parameters for AM stereo transmission when properly maintained and aligned. Reducing IPM and envelope modulation distortion are the same improvements that will enable a transmitter to meet the RF mask limitations.[18]

14. Group W concurs, stating that, "a transmitter that is in proper technical adjustment and employing an NRSC-1 audio processor will meet the requirements of the RF Mask of NRSC-2. Many things can go wrong in a transmitter after the NRSC-1 processor that can cause emissions outside of the desired bandwidth. However, it is unlikely that these undesired emissions would be the result of transmitter design, but rather they would be due to malfunction or improper adjustment."[19] NAB adds that it "has provided evidence that even when some transmitter clipping is employed, NRSC-2 will be satisfied by virtually all stations implementing NRSC-1."[20]

15. Other commenters question whether rigid adherence to NRSC-1 is possible, whether it will be effective in reducing adjacent channel interference, and whether it is even desirable in view of the audio processing limitations it could impose on licensees.

16. Orban, a manufacturer of broadcast audio processing equipment, notes that multi-band audio processors vary their frequency response according to the spectral content of the input audio, and that consequently the instantaneous frequency response of such devices at any given time may depart significantly from the NRSC-1 standard, even if the average response is very close to the standard. Orban believes that it would be very difficult to incorporate a specification for this kind of complex, time-varying behavior in an FCC rule, and that enforcement of such a rule would be virtually impossible.[21] Orban further notes that many stations have audio processors that cost more than five thousand dollars, and that requiring licensees to modify these processors to produce a dynamically controlled output spectrum according to some new audio standard would create significant financial hardship.[22]

17. CRL notes that to be fully effective, the NRSC-1 modification must be installed as the last stage in the audio equipment group just prior to the modulator, with the audio characteristics specified only at that point in the system. However, Delta's comments indicate that even this does not guarantee that adjacent channel interference will be reduced. The potential inadequacy of NRSC-1 was documented by Delta in field measurements of actual stations.[23] One station reportedly had NRSC-1 audio filtering installed and operating, but also employed heavy transmitter clipping. Delta's spectrum analyzer photograph of that station shows numerous emissions at frequencies greater than 10 kHz removed from the carrier, where one would normally expect to see the "brick-wall filter" effect that is intended for signals emitted with NRSC-1 equipment.[24] Thus, Delta observes, "installing an audio filter and then operating a transmitter in such a manner that the spectrum above the filter cutoff frequency is filled back in does not achieve the objectives of the NRSC (to reduce interference)."[25] However, Delta believes that the station mentioned above should be capable of meeting the NRSC-2 emission limitations with inexpensive repairs and/or adjustments.[26]

18. On the other hand, Delta found a station not equipped with NRSC-1 pre-emphasis that met the NRSC-2 emission limitation. This was attributed to the use of conservative audio processing techniques and care to avoid overmodulation. Delta concludes that installation of the NRSC audio filter is no guarantee that the RF emissions will be maintained within the NRSC-2 specification or even the (current) FCC specifications.[27]

19. Greater Media argues that AM station licensees should be allowed to determine the amount of pre-emphasis to use at their stations, noting that some stations may use audio pre-emphasis to compensate for narrow antenna system frequency response.[28] Other commenters pointed out natural incentives to use NRSC-1 audio processing. Orban states that it has demonstrated that using NRSC-1 transmitter pre-emphasis and complementary receiver de-emphasis provides a flat power spectrum response, while use of more extreme pre-emphasis and de-emphasis combinations cause the system to lose power at high frequencies.[29] CRL supports this observation, indicating that in a survey of stations using audio processing equipment, the "average sound" characteristics of most stations responding was very close to the NRSC-1 pre-emphasis curve.[30] Orban further states that AM licensees have additional incentive to limit pre-emphasis to the NRSC-1 standard because use of greater pre-emphasis will cause many receivers that contain slightly asymmetrical ceramic IF filters (due to loose manufacturing tolerances) to produce objectionably distorted audio.[31]

20. In the only comment raising a potential measurement problem associated with the NRSC-2 emission limitation, Bonneville observed that it is possible for transient bursts of audio to cause spurious sidebands beyond 10 kHz that may not be detected with a spectrum analyzer (or other appropriate measurement device) resolution bandwidth of only 300 Hz used to measure compliance.[32]

Comments concerning the presumptive compliance alternative

21. The *Notice* tentatively concluded that the costs of complying with NRSC-1 or NRSC-2 should be about the same. Nevertheless, it solicited comment on whether there might be a public interest benefit associated with presuming that stations complying with NRSC-1 meet NRSC-2, absent evidence to the contrary. This alternative received some support, particularly from those who favor adoption of NRSC-1 but view adoption of NRSC-2 as being more or less inevitable. Thus, SBE proposes that any station implementing NRSC-1 by January 1, 1990, be deemed to be in compliance with NRSC-2.[33] However, SBE asks that such stations be exempt from the current requirement in Section 73.44(a)(1) of the Commission's Rules that licensees measure occupied bandwidth on a routine, annual basis unless notified by the FCC that there is reason to believe excessive bandwidth exists. In that eventuality, they recommend that the station be given 30 days to make measurements and initiate corrective action before the Commission would take enforcement action or issue a Notice of Apparent Liability. As an exception to this policy, SBE suggests that the Engineer-in-Charge of the FCC radio district in which the station resides be delegated authority to specify a shorter remedial period if there is evidence of harmful interference.

22. NAB also supports the presumptive compliance proposal, indicating that it would provide a realistic bridge between compliance with NRSC-1 and NRSC-2. It notes that the Advisory Committee on Radio Broadcasting supported a presumptive compliance method that would require stations to have NRSC-1 equipment in place and operating by January 1, 1990, and two years later require compliance with NRSC-2. However, NAB disagrees with fixing any particular date for NRSC-2 compliance in view of uncertainty over future availability of various (NRSC-2) measuring devices.[34] Thus, NAB suggests that the Commission reconsider mandating NRSC-2 approximately two years after NRSC-1 is implemented.[35]

23. Greater Media and others also expressed support for the presumptive compliance proposal. However, several commenters expressed a note of caution. Orban warned that, "It is dangerous to assume that NRSC-2 will automatically be satisfied if an NRSC-1 filter is installed, because overmodulation or transmitter malfunction can still cause excessive occupied bandwidth."[36] Group W agreed that although it is unlikely that undesired emissions would result from transmitter design, transmitter malfunction or improper adjustment could cause NRSC-2 to be exceeded.[37] The previously mentioned comments of Delta (*see* Paragraph 17, *supra)* further support this view.

DISCUSSION

24. The Commission continues to believe that adoption of the NRSC-2 emission limitation is the best way of ensuring a reduction of adjacent channel interference in the AM service. There are six fundamental reasons for this conclusion: 1) by itself, the NRSC-1 audio standard will not be effective in alleviating interference produced by overmodulation or transmission system anomalies; it requires the NRSC-2 emission limitation to be fully effective; 2) the characteristics of the audio response intended to be produced by the NRSC-1 filter can be readily circumvented or abused by adjustments made to other audio processing equipment; moreover, to the extent NRSC-1 specifies a particular pre-emphasis of audio signals below 10 kHz, it limits licensees' flexibility in adjusting their audio processing equipment; 3) the NRSC-2 emission limitation alone provides effective control of interference due to emitted signals; thus, it renders NRSC-1 redundant; 4) very few transmitters will be unable to comply with

NRSC-2; 5) the NRSC-2 emission limitation is readily enforceable through over-the-air monitoring techniques, whereas determining compliance with NRSC-1 would require an on-site inspection; 6) the cost to licensees of ensuring that a station conforms to NRSC-1 is the same as ensuring that it complies with NRSC-2 (determining the efficacy of either method would require the use of spectrum analysis procedures). These points are developed below.

Efficacy of NRSC-2 versus NRSC-1

25. Implementation of the NRSC-1 audio standard alone would probably lead to some reduction in adjacent channel interference in the AM service. However, because it does not address important transmission system problems such as transmitter overmodulation, incidental phase modulation and spurious signal output, its effectiveness in limiting interference is open to question. We specifically expressed our concern about this problem in the *Notice* and pointed out that the record at that time was deficient with respect to the additional rules that would be required to limit distortion and splatter produced in the transmitter.[38] The record remains silent on this important matter.

26. The comments support our opinion that the NRSC-1 audio standard does not address the transmitter performance requirements that are necessary to ensure a reduction in splatter and adjacent channel interference levels. Under the NRSC-1 approach, interference generated in the transmitter that is not in excess of the current, wider bandwidth emission limits would not be subject to regulation and would continue to degrade the AM service. Therefore, we must conclude that mandating the use of the NRSC-1 audio standard would not provide sufficient regulatory control to limit splatter interference to any greater extent than our current rules. The results of Delta's survey confirm this view. Adherence to good engineering practice is more important than mere use of NRSC-1 audio processing alone in terms of reducing adjacent channel interference. The NRSC-2 emission limitation, being a comprehensive measure of compliance with good engineering practice, appears to be a necessary addition to any formal adoption of the NRSC-1 audio standard. Accordingly, we decline to adopt the NRSC-1 audio standard as a mandatory requirement. This decision renders moot the suggestion of NAB and Group W to institute a special equipment authorization program for NRSC-1 equipment.

Regulatory flexibility

27. We believe that the NRSC-1 audio standard, which specifies in detail a transmitter input frequency response characteristic, should be considered as a highly recommended but nevertheless voluntary standard in order that licensees may be afforded as much flexibility as possible in terms of determining appropriate transmission system input parameters. By focusing our attention on transmission system output standards, such as NRSC-2, we fulfill our regulatory mandate of limiting the interference in the various radio services while allowing licensees to exercise maximum technical creativity in the provision of service.

Comparison of NRSC-1 and NRSC-2

28. The comments suggest that there may be some ambiguity in the way licensees preceive the NRSC-1 audio standard. Some licensees seem to equate NRSC-1 with some kind of "magic box" that for a modest cost can be installed in the audio line and will solve all interference problems. We continue to be concerned that those adhering to this viewpoint may be unaware that improper operation of other elements in the audio chain could negate much of the benefit intended through the use of NRSC-1.

29. However, we believe most commenters more correctly view NRSC-1 as a particular audio processing characteristic that may reduce adjacent channel interference. However, we continue to be concerned that even these commenters may consider NRSC-1 only as an approximate or "target" response, because to consider it as an absolute response would unduly limit their ability to make reasonable, but NRSC-1 incompatible, audio processing equipment adjustments. Rigid adherence to NRSC-1 could negate much of the flexibility currently afforded by their equipment. We agree with Orban that the NRSC-1 response characteristic must be integrated into the audio processing equipment as the approximate response if it is to be effective. However, the record is unclear on how many broadcasters share this view and how many would be willing to forfeit the considerable audio processing flexibility afforded by their current equipment if rigid compliance with NRSC-1 is required. To set no limits on audio processing could potentially negate the benefits of NRSC-1. Yet to mandate its use would restrict licensees' freedom to process their audio in ways that are compatible with a reduction in adjacent channel interference that would be provided by the NRSC-2 emission limitation. Thus, we conclude that use of NRSC-1 should be implemented only on a recommended but voluntary basis.

30. Almost all of the commenters favor our eventual adoption of NRSC-2 as the new AM station emission limitation. NRSC-2 requires that emissions removed more than a 10 kHz from the carrier be substantially attenuated in order to reduce adjacent channel interference.[39] Unlike the NRSC-1 audio standard, the NRSC-2 emission limitation regulates the technical characteristics of the transmitted signal, including interference-causing emissions generated in the transmitter by overmodulation or other causes. Such carefully chosen emission limitations are better able to control interference than an audio-based standard.

31. An important issue is whether NRSC-2 should be implemented now, or some time in the future. In this connection we take note of Orban's comment that the current definition of the NRSC-2 emission limitation is intended as an interim standard, and that to accommodate most transmitters, it is not as stringent as it might be. We concur with this assessment; however, the NRSC-2 emission limitation requires considerable attenuation of sidebands removed 10 kHz or more from the carrier frequency and thus should be quite effective in reducing levels of adjacent channel interference. Its adoption also send a clear signal to receiver manufacturers that AM technical quality is improving.

Implementation and compliance costs

32. Some of the commenters express concern that if we adopt NRSC-2 now, implementation and compliance costs may be greater than if we were to adopt NRSC-1. SBE argues that the current emission limitations are so loose that licensees need not perform measurements to verify compliance with them, and that compliance with more realistic standards could entail some expense. This situ-

ation is not envisioned by the current rules. Section 73.1590 of the Commission's Rules requires AM station licensees to perform measurements to verify compliance with the current emission limitations at least once every 14 months.[40] Thus, amendment of the emission limitations does not impose any new regulatory requirement.

33. We are concerned that some commenters who believe that unnecessary additional effort, time or expense would be required to comply with NRSC-2 may fail to recognize that simply installing an NRSC-1 filter may not be sufficient to achieve a real reduction in the levels of adjacent channel interference. After conversion to NRSC-1, it is highly desirable that the station equipment be carefully analyzed, adjusted, and operated in a manner that will produce all the benefits intended by the addition of the NRSC-1 equipment. We believe that in practice, any additional time, effort or expense incurred to verify proper station operation will be the same for either NRSC-1 or NRSC-2.

34. Nevertheless, under the rules we are adopting, licensees will continue to enjoy considerable latitude in terms of the frequency and the method used to determine station compliance with the new regulations. There is no requirement for continuous monitoring of emissions. Therefore, a licensee is free to defer verifying compliance with NRSC-2 until the time scheduled for determining compliance with the former emission limitations.

35. There is also no requirement that a licensee own measurement equipment. Measurement equipment may be rented, borrowed or shared.[41] We recognize that in many cases, such equipment will be owned by the consulting engineer(s) retained by licensees. Thus, the need to determine compliance with NRSC-2 does not appear to impose significant additional cost, nor does it warrant delay in implementation as some commenters suggest.

36. Some commenters express concern that not all transmitters, after having been properly maintained and adjusted, may be able to meet the the NRSC-2 requirements, and that this could require purchase of a new transmitter at considerable cost. The record contains no evidence that any particular type of AM transmitter will be unable to meet the NRSC-2 emission limitation. The comments of Orban, Delta and Group W indicate that NRSC-2 was designed with current broadcast transmitters in mind and that cases requiring transmitter replacement should be few, if any. These can be dealt with by the FCC individually. Any transmitter that is properly adjusted and maintaining the minimum distortion to accommodate stereo operation should easily meet the emission limitation. Thus, we consider it unlikely that transmitter replacement will be necessary or that any increased burden will be the result from our requiring licensees to comply with the NRSC-2 emission limitations.

Presumptive compliance

37. The *Notice* also discussed an alternate regulatory approach whereby, in the absence of evidence to the contrary, stations adhering to the NRSC-1 audio standard would be presumed to comply with the NRSC-2 emission limitations. This concept is based upon the assumption that stations employing NRSC-1 audio processing and operating a properly adjusted and maintained transmitter should meet the NRSC-2 emission limitations. Because reduced second adjacent channel interference has been noticed from many stations that have voluntarily installed NRSC-1 audio processors, such an assumption appears warranted.

38. As discussed above, it appears that there will be little, if any, difference in compliance cost between NRSC-1 and NRSC-2. Nevertheless, many of the commenters favor the presumptive compliance alternative suggested in the *Notice* as a means of ensuring that implementation and compliance costs are minimized. Thus, we are adopting a presumptive compliance approach with respect to implementation of NRSC-2, as described below.

39. Beginning June 30, 1990, all AM stations will be required to comply with the NRSC-2 emission limitations. However, until June 30, 1994, broadcast licensees also may elect to ascertain compliance with the NRSC-2 standard by adhering to the NRSC-1 audio bandpass and pre-emphasis standard.[42] Licensees making this election will be presumed to comply with the new emission limits, and they will not be required to make periodic emission measurements as required by Section 73.1590(a)(6). The presumption of compliance with the emission limits may be rebutted by technical evidence (e.g., spectrum analyzer measurement results) of non-compliance. If we receive interference complaints containing this evidence, we will require licensees to make their own measurements and take corrective action, if appropriate.[43]

40. Licensees of existing stations who wish to operate pursuant to this presumptive compliance alternative must comply with the NRSC-1 standard by June 30, 1990. Licensees of new AM stations who wish to operate pursuant to this alternative must comply with the NRSC-1 standard upon commencement of operation.

NRSC-2 measurement

41. We note Bonneville' concern that use of 300 Hz spectrum analyzer resolution may not detect transient bursts of splatter above 10 kHz. The 300 Hz resolution bandwidth is primarily necessary to accurately resolve the steep attenuation characteristic slope between 10 kHz and 10.5 kHz. For higher frequencies where emission rolloff is more gradual, a narrow bandwidth is less critical in ascertaining spectrum content. Consequently, a wider bandwidth could be employed in this region. To alleviate this concern, a wider resolution bandwidth may be employed to measure emitted frequencies offset beyond 11.5 kHz in cases where splatter interference from fast risetime emission bursts is suspected.

42. We have also noted a discrepancy between the audio attenuation required by NRSC-1 and the RF attenuation required by the early version of the NRSC-2 standard[44] contained in the *Notice* in the region 10 kHz-10.133 kHz. The early version of NRSC-2 required an attenuation of 25 dB at 10 kHz, whereas the current specification makes a minor adjustment in the region 10 kHz-10.133 kHz to account for the lesser audio attenuation required by NRSC-1. We believe that the most straightforward approach to eliminate this ambiguity between the two standards is simply to adjust the initial 25 dB RF attenuation step to begin at a 10.2 kHz offset rather than at 10 kHz as we initially proposed. This 200 Hz adjustment should not detract from the effectiveness of the NRSC-2 emission limitation and should facilitate measurements. Additionally, the early version of NRSC-2 required 80 dB attenuation for emissions beyond 75 kHz of carrier for all transmitters, rather than taking transmitter power into account as do our current rules and the current NRSC-2

emission limitation. Therefore, we have also revised the minimum attenuation required beyond 75 kHz to conform to the traditional practice. This is consistent with the current NRSC-2 specifications.

43. Based on the foregoing, we conclude that adoption of the NRSC-2 emission limitation will ensure that current levels of splatter and spurious emissions are reduced. Accordingly, we are adopting the NRSC-2 emission limitations as proposed, with the minor modifications discussed above.

OTHER MATTERS

44. The joint comment of "Several Stations" requests that the Commission modify Section 73.37(a), which currently prohibits overlap of the 0.5 mV/m contours of stations separated in frequency by 10 kHz, to permit overlap up to the 1.0 mV/m contours of such stations, provided that the stations are owned by the same group or enter into an agreement to accept interference from such overlap. However, this request is beyond the scope of this proceeding and has not been considered.

45. Station KXKW requests that it be permitted to operate at full power during presunrise and postsunset periods. This request is beyond the scope of this proceeding and has not been considered.

46. The firm of du Treil, Lundin & Rackley requests that the Commission amend Section 73.21(b)(1) to permit Class III regional stations located within the contiguous states to increase power to a maximum level of 50 kW. This request is also beyond the scope of the instant proceeding and not considered.

PAPERWORK REDUCTION ACT STATEMENT

47. The rule changes adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease the burden hours on the public.

48. FINAL REGULATORY FLEXIBILITY ANALYSIS

I. Reason for Action: This action is intended to alleviate technical shortcomings characteristic of the AM broadcast service to make it more competitive with alternative audio delivery services (principally, the FM radio service).

II. Objectives: The objectives of this proceeding are to adopt a new emission limitation to reduce second and third adjacent channel interference to AM broadcast stations.

III. Legal Basis: The action taken by this *Order* is authorized by Sections 4(i) and (j), 302, 303 and 403 of the Communications Act of 1934, as amended, 47 U.S.C §§ 154(i),(j),302,303,403.

IV. Description, Potential Impact and Number of Small Entities Affected: The action proposed in this proceeding would benefit nearly 5,000 AM broadcast station licensees by reducing second and third adjacent channel interference. The cost of modifying transmitters to comply with the new emission standard may be several hundred dollars per station.

V. Recording, Record Keeping and Other Compliance Requirements: None.

VI. Federal Rules which Overlap, Duplicate or Conflict with this Rule: None.

VII. Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objectives: None.

49. The Secretary shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, 5 U.S.C. Section 603(a)(1982).

ORDERING CLAUSES

50. Accordingly, IT IS ORDERED THAT effective **June 30, 1990,** Part 73 of the Commission's Rules IS AMENDED as set forth in the Appendix below. This action is taken pursuant to authority contained in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§154,303.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Title 47 CFR Part 73 is amended, effective June 30, 1990, as follows:

1. The authority citation for 47 CFR Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. 47 CFR 73.44 is amended by revising paragraphs (a) and (b) and adding paragraph (e) to read as follows:

§73.44 Emission Limitations.

(a) The emissions of stations in the AM service shall be attenuated in accordance with the requirements specified in paragraph (b) of this Section. Emissions shall be measured using properly operated and suitable swept-frequency RF spectrum analyzer using a peak hold duration of 10 minutes, no video filtering, and a 300 Hz resolution bandwidth, except that a wider resolution bandwidth may be employed above 11.5 kHz to detect transient emissions. Alternatively, other specialized receivers or monitors with appropriate characteristics may be used to determine compliance with the provisions of this section, provided that any disputes over measurement accuracy are resolved in favor of measurements obtained by using a calibrated spectrum analyzer adjusted as set forth above.

(b) Emissions 10.2 kHz to 20 kHz removed from the carrier must be attenuated at least 25 dB below the unmodulated carrier level, emissions 20 kHz to 30 kHz removed from the carrier must be attenuated at least 35

dB below the unmodulated carrier level, emissions 30 kHz to 60 kHz removed from the carrier must be attenuated at least [5 + 1 dB/kHz] below the unmodulated carrier level, and emissions between 60 kHz and 75 kHz of the carrier frequency must be attenuated at least 65 dB below the unmodulated carrier level. Emissions removed by more than 75 kHz must be attenuated at least 43 + 10 Log (Power in watts) or 80 dB below the unmodulated carrier level, whichever is the lesser attenuation, except for transmitters having power less than 158 watts, where the attenuation must be at least 65 dB below carrier level.

* * * * *

(e) Licensees of stations complying with the ANSI/EIA-549-1988, NRSC-1 AM Preemphasis/ Deemphasis and Broadcast Transmission Bandwidth Specifications (NRSC-1), prior to June 30, 1990 or from the original commencement of operation will, until June 30, 1994, be considered to comply with paragraphs (a) and (b) of this section, absent any reason for the Commission to believe otherwise. Such stations are waived from having to make the periodic measurements required in Section 73.1590(a)(6) until June 30, 1994. However, licensees must make measurements to determine compliance with paragraphs (a) and (b) above upon receipt of an Official Notice of Violation or a Notice of Apparent Liability alleging noncompliance with those provisions, or upon specific request by the Commission.

FOOTNOTES

[1] *See Notice of Proposed Rule Making*, MM Docket No. 88-376, 3 FCC Rcd. 5687 (1988), summarized at 53 Fed. Reg. 36870 (1988).

[2] Comments were submitted by: 4-K Radio, Inc. (4-K Radio); Association for Broadcast Engineering Standards, Inc (ABES); Association of Federal Communications Consulting Engineers. (AFCCE); Bonneville International Corporation (Bonneville); Capital Cities/ABC, Inc. (Cap Cities); Circuit Research Labs, Inc. (CRL); Consumer Electronics Group-Electronic Industries Association. (CEG/EIA); du Treil, Lundin & Rackley, Inc; Delta Electronics,(Inc. (Delta); GSM Media Corporation, WRGM (GSM); Greater Media, Inc. (Greater Media); KANE-AM (KANE); KXKW-AM (KXKW); Kneller Broadcasting of Charlotte County, Inc. (Kneller); National Association of Broadcasters (NAB); National Public Radio (NPR); Orban Associates, Inc. (Orban); Radio Advisory Committee (RAC); Society of Broadcast Engineers, Inc. (SBE); Stephen R. Weber, Jr. (Weber); WOKT, WTGR, WFTK, and WNOW (Several stations); Westinghouse Broadcasting Co (Group W). Reply comments were submitted by: CBS Inc. (CBS); Capital Cities/ABC, Inc. (Cap Cities); Delta Electronics, Inc. (Delta); GSM Media Corporation. (GSM); National Association of Broadcasters (NAB); Orban Associates Inc. (Orban) and the US Department of Commerce (NTIA).

[3] *See Notice*, ¶¶ 7-11.

[4] Pre-emphasis is a deliberate boosting of the high frequency content of an audio signal in order to overcome noise or, in the case of AM broadcasting, to compensate for receiver inadequacies.

[5] The reference level employed for NRSC-1 audio measurements is 1 dB above a 200 Hz sinewave modulated at 90% negative modulation.

[6] *See Notice* ¶ 24.

[7] It is for this reason that equipment suppliers and consulting engineers caution that transmitter protective limiters should not be used to maintain average modulation or to increase loudness. *See* comments of Delta at 10, and *Modulation, Overmodulation and Occupied bandwidth; Recommendations for the AM Broadcast Industry*, Harrison J. Klein, P.E., in the *41st Annual NAB Engineering Conference Proceedings* (1987) (*Klein Report*), at 18.

[8] Non-linear response on the part of any audio or radio frequency component of the transmission system can generate harmonic signal components that cause distortion.

[9] *See* comments of AFCCE at 2. *See also*, comments of Greater Media at 3, GSM at ¶ 13, CRL at 6, RAC at 3, Bonneville at 4 and Cap Cities at 2.

[10] *See* comments of SBE at 6.

[11] *See* comments of NAB at 5.

[12] *See* comments of SBE at 2.

[13] *Ibid.*

[14] *See* comments Orban at 4.

[15] *See* comments of Group W at 3.

[16] The term "RF mask" is commonly used by the commenters to refer to emission limitations (generally, the NRSC-2 emission limitations).

[17] *See* comments of Delta at 26.

[18] *See* reply comments of Delta at 3.

[19] *See* comments of Group W at 5.

[20] *See* comments of NAB at 7. Although this comment was submitted in the context of justifying the adoption of NRSC-1 alone, it also is relevant to the issue of whether most transmitters can comply with NRSC-2.

[21] *See* comments of Orban at 4.

[22] *See* comments of Orban at 3.

[23] *See* comments of Delta at 14.

[24] *See* comments of Delta at 17, Figure 4.

[25] *See* comments of Delta at 14.

[26] *See* comments of Delta at 25.

[27] *See* comments of Delta at 18.

[28] *See* comments of Greater Media at 14.

[29] *See* comments of Orban at 3.

[30] *See* comments of CRL, at 1 & 2.

[31] *See* comments of Orban at 3.

[32] *See* comments of Bonneville at 5.

[33] *See* comments of SBE at 5.

[34] *See* comments of NAB at 10.

[35] NAB and Group W also recommend that the Commission institute a "type notification" program for NRSC-1 audio processing equipment to provide a way to enforce compliance with the audio standard.

[36] *See* comments of Orban at 5.

[37] *See* comments of Group W at 5.

[38] *See Notice*, ¶¶ 14-17.

[39] *See Emission Limitation for AM Broadcast Transmission*, EIA/IS-51, September, 1988 (NRSC-2) and Appendix A, §73.44(a) and (b).

[40] *See* 47 CFR 73.1590(a)(6) and (b).

[41] *See also* comments of Orban at 5, "(Orban) believe(s) that such a splatter monitor could be shared by several stations in a market (perhaps as coordinated by the local chapter of the

Society of Broadcast Engineers). The splatter monitor would be used to periodically verify that a given station was adjusted to meet NRSC-2 requirements."

[42] We see no reason why the presumptive compliance alternative should continue indefinitely. The termination date we have selected, June 30, 1994, is five years beyond the approximate release date of this *Order*, four years beyond the effective date of the new emission limitation and two years after the NRSC-2 implementation date envisioned by a number of the commenters. This is ample time for for broadcasters to verify that they do, in fact, comply with the new emission standard.

[43] SBE's request that licensees be given 30 days notice before the Commission initiates an enforcement action constitutes a fundamental and unprecedented change in the Commission's enforcement policy that is beyond the scope of the *Notice*. Therefore, it is denied.

[44] *See, Interim Emission Limitation for AM Broadcast Transmission*, National Radio Systems Committee, September 9, 1987.

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Amendment of Part 73 of the Commission's Rules to Adopt a new Emission Limitation.

Thomas Edison once said that the prerequisite for progress is discontent. Nobody is content with current levels of AM interference; as a result, there is a strong consensus for change. Today's decision is a significant step forward in our efforts to reduce AM interference. I hope that AM licensees will move quickly to comply with the new standard, and that receiver manufacturers will get the message and give consumers the option of buying higher-quality AM receivers. More broadly, this item is part of an overall review of our AM technical rules that could lead to major improvements in the technical quality of AM service. Individually, each of these items makes only incremental progress; collectively, they contribute to our long-term goal of reducing the interference that we at the FCC unfortunately helped to create.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-29

In the Matter of

Amendment of Section 73.202(b),	RM-4941
Table of Allotments,	RM-5399
FM Broadcast Stations.	
(Greenup, Kentucky and Athens, Ohio)	

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 1989; Released: April 27, 1989

By the Chief, Policy and Rules Division:

1. The Commission has before it the petition for reconsideration filed by WATH, Inc. (WATH) of the *Report and Order* (*Order*) in this proceeding, 2 FCC Rcd 4319 (1987), which substituted FM Channel 289B1 (105.7 MHz) for adjacent Channel 288A (105.5 MHz) at Greenup, Kentucky, and modified the license for Station WLGC-FM to specify operation on the new frequency. The *Order* also denied a mutually exclusive proposal by WATH, licensee of Station WXTQ-FM at Athens, Ohio, to make a similar substitution of channel and modification of its license. WATH filed a petition for reconsideration of these actions. Greenup County Broadcasting, Inc. (GCB), licensee of Station WLGC-FM, filed an opposition. WATH filed a reply.[1]

BACKGROUND

2. The *Notice of Proposed Rule Making* (*Notice*), 51 FR 4940 (1986), in this docket was issued as a result of GCB's petition, which requested the substitution of Channel 289B1 for its existing Channel 288A allotment. WATH timely filed a counterproposal to substitute Channel 289B1 for 288A at Athens, Ohio and to modify its license accordingly. WATH's proposal was mutually exclusive with GCB's proposal, because the Class B1 site at Athens, located 98.3 kilometers (61.1 miles) from the proposed Class B1 site at Greenup, is less than the required distance of 175 kilometers (109 miles) between Class B1 co-channel stations. *See* 47 CFR Section 73.207. The staff determined that no alternative adjacent or co-channels were available for direct modification of license. *See* 47 CFR Section 1.420(g).

3. In the *Order*, we examined the two conflicting proposals using the four allotment criteria as set forth in *Revision of FM Policies*, 90 FCC 2d 88 (1982). Under the first three criteria--whether a first or second full-time aural service or first local service would be provided--we concluded that neither proposal qualified. Since both communities have existing FM stations, neither community would be provided its first local service. For each proposal, we found small areas where a second aural service would, in fact, be provided, but determined that the areas were not large enough to constitute a clear preference for either proposal. We determined the extent of these expanded service areas by first drawing on a map WLGC-FM's and WXTQ-FM's existing Class A primary service contours, utilizing a radius of 24 kilometers (15 miles) at each existing site. We then superimposed the Class B1 service contours with a radius of 45 kilometers (28 miles) over the Class A service contours. The areas encompassed by the Class B1 contours and not within the Class A contours were the respective gain areas. The approximate signal field strength of a Class B1 station operating with maximum facilities is 0.7 mV/m measured at its service contour of 45 kilometers. For a full-powered Class A station, the approximate field strength at 24 kilometers is 1.0 mV/m.

4. Since application of the first three allotment priorities did not yield a clearly preferred proposal, we compared the two proposals using the fourth criterion, other public interest matters. In doing so, we considered which proposal would provide a new service to the larger population within each respective gain area. We used the same methodology as above, and then estimated the extent of penetration of the predicted Class B1 contours into county divisions not included in the coverage of the Class A contours. That penetration, expressed as a percentage of a county's land area, was applied to the total population of the county to determine how many persons theoretically would benefit from the new service.[2] By comparing the calculated population totals within the respective gain areas, we determined that WLGC's proposal would result in a new primary service to the greater number of persons, and, therefore, should be preferred.

THE PLEADINGS

5. In its petition for reconsideration of the *Order*, WATH contends that we overcalculated the amount of existing service in the gain area of its station WXTQ-FM, because we utilized the incorrect service contours, thereby artificially minimizing the number of newly served persons, and failing to consider a second aural service that WXTQ-FM would have provided to a significantly sized population. WATH also contends that the test used to choose between alternative allocations improperly considered the gross populations of the respective coverage areas without considering other existing radio services.

6. WATH contends that we did not apply the standards set forth in *FM Table of Assignments* (*Roanoke Rapids and Goldsboro, NC),* Further Notice of Proposed Rule Making in Docket No. 17095, FCC 67-665, 32 Fed. Reg. 8530 (June 14, 1967) (*Roanoke Rapids)* [3] for evaluating areas of coverage that would be provided with a first or second aural service. It claims that the Commission in *Roanoke Rapids* stipulated, when calculating coverage provided by existing Class B stations and allotments, the use of the predicted 1.0 mV/m contour assuming the greater of existing facilities or 30 kilowatts effective radiated power (ERP) at 300 feet height above average terrain (HAAT). WATH argues that the 1.0 mV/m contour serves as the "primary service contour" for FM and that standard broadcast engineering practice has recognized it as such because of the Commission's use and reliance on this contour, citing its use in the Commission's rules for specifying coverage (Section 73.311), determinations of multiple ownership (Section 73.3555), and transmitter lo-

cation (Section 73.315). The 1.0 mV/m contour, urges WATH, is distinguished from the "interference free contour" for the various classes of FM stations that existed before the new classes established in the *First Report and Order* in BC Docket No. 80-90, 94 FCC 2d 152 (1984). WATH claims that for Classes A, B, and C, the contours were approximately 0.912 mV/m, 0.524 mV/m, and 1.023 mV/m, respectively. WATH characterizes their "primary use . . . as a theoretical concept to which protection must be provided." In order to protect an area within these interference-free contours, claims WATH, the Commission adopted minimum distance separations between commercial FM stations and deemed such an area protected if the required separations were met. It also noted that the 1.0 mV/m contour is employed in FM comparative hearings for determinations of which proposal best serves Section 307(b) of the Communications Act of 1934, as amended. Finally, WATH asserts, that given the widespread use of the 1.0 mV/m contour and the recognition of that contour by the Commission as the salient coverage standard, the use of the 0.5 mV/m contour for Class B stations, as we did in the *Order*, is incorrect. Had the *Order* used the correct contour, WATH claims that its upgraded FM station would be shown to provide a second aural service, and, as a consequence, the *Order* should be reversed.

7. WATH also questions the use of maximum facilities for determining the upgraded coverage areas of the Class B1 stations, arguing that *Roanoke Rapids* is precedent for the use of "reasonable facilities". It claims that the *Order*'s assumption of maximum facilities is unreasonable for two reasons. First, WATH argues, there is no requirement that stations operate at maximum facilities for their class. Second, there is no economic incentive for them to do so. Therefore, WATH concludes, an assumption of full coverage does not reflect the reality of FM coverage, and accordingly does not serve the public interest.

8. Finally, WATH submits that rather than comparing raw population statistics alone, which gives an undue preference to urban areas over rural locations, the more appropriate test is that of the comparative hearing model. Under its precepts, a preference to an applicant for superior coverage of an extended area is mitigated if that area receives five or more services. WATH notes that 84% of the gain area of WLGC-FM already receives aural services from five or more FM stations, whereas less than 49% of the gain area of WXTQ-FM already receives service from five or more FM stations. WATH therefore argues that WXTQ-FM is more deserving of an upgrade because it is more removed from the larger population centers that have a multiplicity of aural services.

9. In opposition, GCB disputes WATH's reliance on *Roanoke Rapids* as providing the standards for determination of "white" and "gray" areas.[4] It contends that the *Roanoke Rapids* test, developed when commercial FM radio was in its infancy, is not appropriate for today's FM aural services. GCB claims that Docket 80-90 consciously modified the "engineering underpinnings" of *Roanoke Rapids*, and also rejected the adoption of a uniform protection standard of 1.0 mV/m in favor of the continued use of 0.5 mV/m for Class B stations (and the new use of 0.7 mV/m for Class B1 stations). It also disputes WATH's contention that there is a distinction between the primary service contour and the interference-free contour, noting that the service radius is determined by the co-channel distance separations, which provide interference protection for Class A stations to approximately the predicted 1.0 mV/m contour, and for Class B stations to approximately their predicted 0.5 mV/m contour. With respect to the use of the 1.0 mV/m contour in hearings, GCB asserts that this is an evidentiary standard under which a sponsor is subject to cross examination and its proponent to rebuttal. Such a procedure is inappropriate for rule making, it asserts. Finally, GCB argues that granting an upgrade to station WXTQ-FM at Athens (Athens County having ten broadcast outlets as compared to two in Greenup County) runs counter to the principle that excessive concentration of FM assignments in larger cities should be avoided, and instead, adequate service to more sparsely populated regions should be insured. GCB contends that the *Order* was consistent with the statutory mandate of Section 307(b).

10. In reply, WATH notes three problems with GCB's assertion that the 1.0 mV/m contour is not recognized as the primary service contour. First, WATH contends that GCB does not adequately address the case law cited by WATH that purportedly gives implicit recognition of the 1.0 mV/m contour as the "standard representation" of the limits of a station's primary service area. Second, WATH contends that GCB's position is based on a faulty reading of Docket 80-90, believing incorrectly that the measure of service to be used in FM channel allotment proceedings is the interference-free contour. WATH contends instead that the only issue addressed in Docket 80-90 was whether Class B stations should use the 1.0 mV/m contour as the interference-free contour. While the Commission affirmed what the Class B interference-free contour was, WATH argues, it did not address what the primary service contour is. Third, GCB did not offer any support by affidavit from a qualified broadcast engineer. WATH also notes that what is done in hearings is appropriate in rule makings or other non-hearing cases without an evidentiary hearing format, because rule making proceedings allow a thorough airing of disputes, which can be evaluated by competing engineering showings without the need for witnesses or cross-examinations. Lastly, in rebuttal to GCB's characterization of Greenup as an isolated, rural community more deserving of the allotment than Athens, WATH notes that WLGC-FM's coverage would encompass a significantly larger population than that of WXTQ-FM, much of it in several communities near Greenup. For these reasons, WATH asserts that GCB has failed to rebut its petition, and that the *Order* should be overturned.

DISCUSSION

11. After careful review of our policies and consideration of a change in the circumstances existing when the *Order* was released, we conclude that it must be reversed. Due to the relocation of an existing FM station during the pendency of this proceeding, we find that a region in the gain area of WXTQ-FM with a significantly sized population would receive a second aural service if its proposal is adopted. We discuss below the grounds supporting our decision.

The 1.0 mV/m Service Contour

12. The first issue we discuss is what field strength contour should be utilized in FM allotment proceedings to compare and evaluate service areas. In order to frame the issue, we provide some historical background. The present FM Table of Allotments was established as an

alternative to the protection of certain field strength contours, most prominently the predicted 1.0 mV/m contour. *See FM Broadcast Rules*, First Report and Order in Docket 14185, 40 FCC 662, 682-685 (1962). The Commission adopted instead a system of protecting from interference a specified area of potential service, by relying on the distance separation between stations assumed to operate with maximum facilities for their respective classes. The resulting protected area of service is circumscribed by a certain field strength contour (based on a specified level of facilities) called the protected contour.[5] In Docket 14185, the Commission adopted service area radii of 15, 40, and 65 miles for Classes A, B, and C, respectively, along with appropriate interstation distance separations. The predicted field strength contours at the boundaries of such service areas were 0.927 mV/m, 0.562 mV/m, and 0.944 mV/m, respectively.[6] Protection of the Class B service area to a lower field strength contour, that of approximately 0.5 mV/m, was considered as acceptable as long as the signal was adequate to provide good reception by the average receiver at the boundary of the service area.[7] In any event, the signal strength at the protected contour for Class B (and for Class B1) differs from the approximate 1.0 mV/m protected contour for the other classes. The primary issue in this case, then, is whether 1.0 mV/m is the single contour that serves as the Primary Service Contour, irrespective of the particular protected contour for a given class of station.

13. The 1.0 mV/m signal strength contour has long been employed as a measure of the extent of coverage for all classes of FM stations. As recognized in *Roanoke Rapids*, *supra*, it is the contour used for the determination of coverage areas to be compared when competing proposals for allotment of new channels are at issue -- in a hearing or otherwise. *See, e.g. RAM Enterprises, et al.*, 57 FCC 2d 844, 852 (1976). Moreover, FM application Form 301 expressly requests, as required by Section 73.311, that in estimating coverage for any given FM station, including Class B and B1 stations, the predicted 1.0 mV/m contour shall be used.[8] WATH correctly notes the use of the 1.0 mV/m contour in the Rules for specifying coverage, determinations of multiple ownership, and for guidance in locating the transmitter, irrespective of the class of the station. In *Multiple Ownership*, First Report and Order in Docket 20548, 63 FCC 2d 824, 826 at n. 5, the Commission gave an explicit definition for Primary Service Contour. This authority has been used by the Commission in comparative hearings in support of its use of the 1.0 mV/m contour for Section 307(b) coverage comparisons. In hearing designation orders for mutually exclusive FM applications, it is routinely and explicitly stated that only the area and population within the 1.0 mV/m contour will be considered for determination of comparative preferences for the respective applicants. We also note that for purposes of "overheight power reduction", the predicted 1.0 mV/m contour was chosen as the basis for determining "equivalence" for a station.[9] Finally, in a very recent Commission decision, *FM Technical Parameters*, *supra* n. 9, the Commission adopted a system for classification of FM stations that depends expressly on the distance to the 1.0 mV/m contour, in this case called the class contour.[10]

14. The use of the 1.0 mV/m contour, therefore, is the exclusive standard for comparing stations' areas of coverage as well as for other instances in which coverage is at issue. It is well grounded in Commission practice and precedent and, moreover, is the most reasonable of the alternatives suggested. Furthermore, it appears most appropriate to compare and consider the coverage areas of all classes of FM stations using common ground rules. It follows, therefore, that a common received signal strength should be used to insure that the extent of the area of acceptable reception (or coverage) is compared on the basis of the identical quality of service. In general, the quality of Class B and B1 signals suffers (relative to that of Class A, C1, C2, and C signals) in the outer regions of their protected service areas beyond the predicted 1.0 mV/m contour. In these outer regions, Class B and B1 signals are more susceptible to ambient noise and other perturbations, which generally results in lesser quality reception.[11] Accordingly, on reconsideration we have employed the 1.0 mV/m contour as the basis for comparing the extent of new coverage proposed by GCB and WATH, irrespective of class of station.

Reasonable Facilities

15. We reject WATH's reliance on *Roanoke Rapids* as support for the proposition that less than maximum facilities should be used for service area determinations. The *Roanoke Rapids 3d R&O*, *supra* n. 3, was decided in 1967, at the infancy of FM broadcasting. At that time, an assumption of a particular level of "reasonable facilities" less than the maximum allowable for the class of station had some validity. As the Commission stated in *Roanoke Rapids*, it assumed a specific level of facilities as reasonable because at that time "such facilities [were] readily obtainable . . . [and] it is expected that existing stations operating with lesser facilities will apply for greater facilities as FM develops and receives wider public acceptance." This statement comported with the realities then existing for FM broadcasting, only three years after the adoption of the Table of Allotments. The underlying assumptions embodied in the Table, however, reflected the longer view. Maximum facilities were assumed for each allotment in the Table to allow for orderly growth and development of the new service. That assumption, and the distance separation criteria flowing from it, allowed stations to specify lesser facilities, but maintained the option of later expanding a station's service area as economic conditions warranted. Now, however, the FM service is the dominant aural medium, and there are significant economic incentives for stations to provide service to the greatest area possible for their class of station. Among other things, FM radio draws substantial revenues from providing service to persons utilizing automobile radios, and, therefore, there are significant incentives to provide service to as wide an area as possible, consistent with the mobility afforded listeners using automobiles. With the maturation of the FM service, it is particularly appropriate and reasonable to compare coverage areas assuming maximum allowable facilities.[12] We will continue to follow *Roanoke Rapids 3d R&O* as precedent for the use of "reasonable facilities" when comparing coverage areas of competing proposals. However, we do not believe the "reasonable facilities" standard established by *Roanoke Rapids 3d R&O* requires that the precise technical standard found reasonable in the early 1960s should be held up as an inviolable standard for all time. A hallmark of our regulatory oversight is the flexibility to hone our regulatory tools consistent with the changing realities in the industry and the communications marketplace. Accordingly, we reject GCB's contention that we should use the precise technical guidelines the Commission set forth

more than twenty years ago. We believe the precise assumptions we have utilized are reasonable and consonant with the intent of *Roanoke Rapids 3d R&O*, in that they comport with the realities of present-day FM service, and in addition, provide simplified guidelines for evaluating service gains made in new proposals.[13]

Gain Area Reevaluation

16. In reevaluating the respective gain areas, we employed the same methodology described in para. 3, *supra*, but used the 1.0 mV/m field strength contours of all stations involved, assuming maximum facilities for each respective class of station. We utilized this contour as the Primary Service Contour rather than 0.5 mV/m and 0.7 mV/m for Classes B and B1, respectively, used in the *Order*. Utilizing this modified methodology, we find that under the circumstances existing at the time the *Order* was issued, and as we had found there, no significantly sized population within the expanded coverage area of either station would receive a first full-time aural service, and an upgraded WLGC-FM near Greenup would not provide a second aural service to its gain area. For Athen's WXTQ-FM gain area, we find a small but insignificantly sized area that receives only AM station WLW. However, matters have changed since the *Order* was issued. One station in WXTQ-FM's gain area, WKOV-FM, serving Wellston, Ohio, has relocated southward, removing its coverage to a part of WXTQ-FM's gain area.[14] This has resulted in a significant enlargement of the area served only by AM station WLW.[15] The enlarged area near Athens that would receive a second aural service is in Vinton County, Ohio, and contains 86 square kilometers (33 square miles) and 3005 persons.[16] The relocation of WKOV-FM during the pendency of WATH's petition therefore represents a significant change in circumstances with great potential for affecting the Section 307(b) preference.

17. In choosing between the conflicting proposals, the Commission compares them on the basis of the priorities as set forth in *Revision of FM Policies, supra*. In any given case, any one of these priorities may be dispositive. In the *Order*, because priorities one, two, and three were inapplicable to either proposal, we determined that GCB's proposal should prevail using the fourth of the allotment priorities, other public interest matters. Here, however, the relocation of station WKOV-FM creates a gray area where none of significant size existed before. Because the expanded coverage area proposed by WXTQ-FM would, by serving that gray area, now satisfy allotment priority two, provision of a second aural service, instead of lower priority four, we find a change in core circumstances. This justifies our revisiting the Section 307(b) issue and altering our decision. *See Golden State Broadcasting Corp.*, 59 RR 2d 477 (1985). *See also Warmac Communications, Inc.*, 63 RR 2d 1510 (1987).

CONCLUSION

18. Thus, given that the expanded service of Station WXTQ-FM in Athens, Ohio would provide a second full-time aural service to a portion of its expanded service area, and that of WLGC-FM would not, WATH's proposal prevails. We believe the public interest will be better served by the substitution of adjacent channel 288A at Athens, Ohio, with the appropriate site restriction of 5.5 kilometers (3.9 miles) west of the city.[17] Upon reconsideration, therefore, WATH's petition for reconsideration will be granted and the *Order* will be reversed.

19. Accordingly, pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), and 0.283 of the Commission's Rules, IT IS ORDERED That effective **June 12, 1989,** the FM Table of Allotments, Section 73.202(b) of the Rules IS AMENDED with respect to the following communities:

City	Channel No.
Greenup, Kentucky	288A
Athens, Ohio	282A, 289B1

20. IT IS FURTHER ORDERED That the Petition for Reconsideration filed by WATH, Inc. IS GRANTED.

21. IT IS FURTHER ORDERED That, pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of WXTQ-FM, Athens, Ohio, IS MODIFIED, to specify operation on Channel 289B1 in lieu of Channel 288A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Memorandum Opinion and Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

22. IT IS FURTHER ORDERED, That the Motion for Stay filed by WATH, Inc. is DISMISSED as moot.

23. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

24. For further information concerning this proceeding, contact J. Bertron Withers, Jr., Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Accompanying its petition, WATH also filed a Motion for Stay of the *Order* pending action on the petition. Such request for stay is unnecessary since a stay is automatic under §1.420(f), upon the filing of a petition for reconsideration of an order specifying operation on a different channel. We will, therefore, dismiss WATH's request for stay as moot.

[2] Additionally, populations within each county were assumed to be uniformly distributed. To prevent anomalous results, high density population centers such as identifiable communities located outside the predicted Class B1 service contour of the station or located within the Class A contour were excluded from the county population totals prior to performing the calculations.

[3] We consider the precedential case to be the Third Report and Order in Docket 17095, 9 FCC 2d 672 (1967) (*Roanoke Rapids 3d R&O)*, not the Further Notice cited by WATH. The Further Notice, however, is of particular value because it articulates the reasons for the eventual adoption of the standards for evaluating coverage areas, while the *Roanoke Rapids 3d R&O* only recites them.

[4] For purposes of FM allotments, a white area is a geographical area that is not served by any full-time aural service and a gray area is one that is served by only one full-time aural service.

[5] This protected contour is referred to incorrectly by WATH as the "interference free contour". The interference-free contour is something else, however, and is accurately defined as that contour which circumscribes an area in which the ratio between an undesired signal and the desired signal is equal to or exceeds certain protection ratios. The protection ratios for commercial FM stations are: 1:10 (or -20 dB) for co-channel stations, 1:2 (or -6 dB) for first adjacent channel stations, and 100:1 (or +40 dB) for second and third adjacent channel stations. *See* n. 11, *infra*. Although the area of coverage inside the protected contour is designed to experience undesired-to-desired signal level ratios no less that the applicable protection ratios, *i.e.* the area is deemed to be "interference-free", there may be instances where this is not the case for the entire area. This might occur where two adjacent or co-channel stations are located at or near a minimum separation distance between them, such that the predicted interfering contour of one station overlaps the predicted protected contour of the other. In the area of the overlap, the applicable protection ratio would not be met, and, accordingly, that portion of the protected area would no longer be regarded as "interference-free." However, under the current allotment scheme, we deem the nominally protected area as being afforded complete protection by the minimum distance separation between stations (assuming maximum facilities for the class of station), regardless of any such contour overlap.

[6] These figures were based on propagation curves in use at the time of Docket 14185. The curves have since been revised. *See Field Strength Curves*, 53 FCC 2d 855 (1975). Using the new curves, the calculated field strengths at the perimeter of the primary service area for Class A, B, and C stations, assuming maximum facilities and uniform terrain, are respectively 1.008, 0.519, and 1.004 mV/m. For Classes A, C1, C2, and C, the respective service radii are approximately 24, 52, 72, and 92 km (approximately 15, 32, 45, and 57 mi), at which distances the field strengths are each approximately 1.0 mV/m. For Classes B and B1, the service radii are 64 km and 45 km (approximately 40 and 28 mi), respectively, and the field strengths approximately 0.5 mV/m and 0.7 mV/m. The predicted 1.0 mV/m contours for Class B and B1 stations lie at distances of 52 and 39 km, respectively. *See* n. 10, *infra*.

[7] The 0.562 mV/m contour exists at the boundary of the service area of a Class B station in FM Zone I assuming approximately a 40-mile radius, using maximum facilities of 50 kW and 500 ft (now 50 kW, 150 m). This was based on the size of the New York City metropolitan area in the 1960s of about 40 miles in radius. *FM Broadcast Rules*, *supra* at 681, 682.

[8] The Commission also requests in Section V-B of Form 301, item 17, that the 3.16 mV/m contour be specified, which is used exclusively as the standard for the minimum level of signal required to be placed over the principal community to be served.

[9] *FM Broadcast Rules* at 689-690. Overheight power reduction is employed whenever the actual HAAT is more than the nominal maximum, now called the "reference HAAT". In such case, the maximum effective radiated power must be reduced so that the "reference distance" (the distance to a station's 1.0 mV/m contour) maintains equivalence, *i.e.* the distance to that contour does not change from what it would be assuming maximum facilities. Reference HAAT and reference distance were codified in §73.211(b) in *FM Technical Parameters*, Second Report and Order in MM Docket 86-144, 2 FCC Rcd 5693 (1987) (*FM Technical Parameters)*.

[10] §73.211(b) lists in tabular form the distances to the class contours, *i.e.*, the rounded distances to the 1.0 mV/m contour by class of station. For Classes B and B1, they are 52 and 39 km, respectively.

[11] The portion of the service areas between the Class B and B1 1.0 mV/m contours and their 0.5 mV/m and 0.7 mV/m contours comprises, respectively, approximately 1/3 and 1/4 of their protected service areas. Theoretically, at the boundaries of these protected areas, the quality of service is the same as that for the other classes of stations at their service contours. The service radii and interstation separations were chosen so as to maintain, at the protected contour of each class of station, certain protection ratios, depending on its channel relationship to another station. *See* n. 5, *supra*. These protection ratios were specified such that no interference is said to occur within the protected service area. These protection ratios apply regardless of the strength of the desired signal (or the undesired signal) specified at the protected contour, and do not account, for example, for the greater susceptibility to noise of a weaker 0.5 mV/m Class B signal than a 1.0 mV/m Class A signal.

[12] We make one exception, however, for Class C stations. In determining the extent of service, the Commission uses the Class C ERP of 100 kW (except in those rare instances in which a Class C station must reduce its power because its HAAT is greater than the maximum reference HAAT for Class C, in which case the Commission utilizes the actual ERP) and either the licensed HAAT for existing stations or the Class C minimum HAAT of 300 meters for vacant allotments. *See FM Table of Allotments (Benton, AR)*, 2 FCC Rcd 1963 (1987), n. 7. This guideline is applied in recognition of the fact that, while it is not particularly difficult to achieve an ERP of 100 kW, it often is difficult to realize facilities with an HAAT above the Class C minimum up to its maximum of 600 meters. FAA constraints, environmental considerations, local zoning ordinances, and high cost often prevent construction of tall towers necessary to achieve full Class C HAAT. While these and other realities of station construction require a departure from our general rule when full Class C stations are involved, the same constraints generally do not apply with the Class B stations involved in this case.

[13] In view of our ultimate determination in this case, we need not address WATH's argument that WLGC-FM's supposed advantage of covering a larger population is diminished because a greater portion of WLGC-FM's gain area receives 5 or more aural services.

[14] WKOV-FM was licensed at a new site eight (8) kilometers south-southwest of its old site on March 29, 1988 . It now shares a tower with Station WCJO-FM serving Jackson, Ohio. The tower is located at coordinates 39-01-45 and 82-35-51. *See* License File No. BLH-870914KF.

[15] WLW's 0.5 mV/m nighttime groundwave signal covers this entire region and qualifies as service for communities with populations of less than 2500 persons. *See* §73.182(e). Both of the communities in the gray area have such populations.

[16] Whereas the only identifiable town in the gray area of Vinton County had been Zaleski, Ohio with a population of 347, the enlarged gray area (determined to be 85.8 km^2 by planimeter measurement) now includes the county seat of McArthur, Ohio with a population of 1912. That area is bounded by the present FM coverage contours of WXTQ-FM, that of WHOK-FM and WYPC-FM, both Class B stations, and WKOV-FM, a Class A station like WXTQ-FM.

[17] The coordinates for this site restriction are N 39-20-31 and W 82-09-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-209

In the Matter of

Amendment of Section 73.202(b),	RM-5700
Table of Allotments,	RM-5768
FM Broadcast Stations.	RM-5926
(New Ulm, Bryan, Huntsville, Cameron,	RM-6079
Creedmoor, and La Grange, Texas)	RM-6080

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 1989; Released: April 27, 1989

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration of the *Report and Order* (*Order*) in this proceeding, 53 FR 40891, October 19, 1988, filed by Hicks Communications, Inc. (Hicks), licensee of FM station KTSR, College Station, Texas.[1] The *Order* allotted an FM channel to the communities of New Ulm, Texas for its first local FM service on Channel 222A (92.3 MHz), and to Huntsville, Texas for its second local FM service on Channel 235A (94.9 MHz). We also substituted Channel 284C2 (104.7 MHz) for adjacent channel 285A (104.9 MHz) at Bryan, Texas and Channel 280C2 (103.9 MHz) for Channel 276A (103.1 MHz) at Cameron, Texas, and modified the license of each station in these latter two communities to specify operation on the respective new frequencies. Hicks, not an original party to this proceeding, specifically requests that the *Order* be reconsidered insofar as it concerns the allotment of Channel 235A to Huntsville. During the pendency of the *Notice*, Hicks timely filed a counterproposal in MM Docket No. 88-48 requesting that Channel 235C2 be allotted to College Station, Texas and that its license be modified accordingly.[2] Radio U.S.A. Ltd. (Radio U.S.A.), licensee of FM station KKYS, Bryan, Texas, filed an opposition and Hicks filed a reply.

2. In its petition for reconsideration, Hicks states that we should rescind the allotment of Channel 235A to Huntsville because it had not been timely proposed by Radio U.S.A. and, moreover, was not placed on public notice. Hicks avers that this allotment preempted consideration of its counterproposal filed in MM Docket 88-48, which caused it to incur substantial unnecessary expense. Moreover, Hicks contends, Radio U.S.A.'s "Comments" advanced a counterproposal in a reply to a counterproposal, prohibited by Section 1.420(d) of the Commission's Rules. Hicks asserts that the Commission should have ignored this pleading and placed Radio U.S.A.'s proposal on public notice, giving it the opportunity to comment on the proposal, instead of "surreptitious(ly)" adopting it.

3. Hicks, believes, however, that the Commission need not forego the allotment of a new Class A channel to Huntsville. It submits that its petition can be granted, and that Channel 259A can be substituted for Channel 235A to provide an equivalent service at Huntsville and, thus, Channel 235C2 can be allotted to College Station instead. All other new allotments and substitutions in the *Order* and proposals in MM Docket No. 88-48 would remain the same, claims Hicks. It also pleads that this resolution is preferable to Hicks' unnecessarily having to refile its request in that docket as a counterproposal or a separate petition for rule making. Radio U.S.A., while arguing that Hicks' reconsideration petition is meritless, states, nevertheless, that it has no objection to Hicks' proposal that Channel 259A be substituted for Channel 235A at Huntsville so that Hicks may upgrade its facilities at College Station on Channel 235C2. Since Hicks is proposing a mere substitution of another Class A channel in Huntsville, argues Radio U.S.A., any further reconsideration is unnecessary in light of the Commission determination that a new Class A facility in Huntsville is in the public interest.

4. Given Radio U.S.A.'s agreement with Hicks' proposal that Channel 259A be substituted for Channel 235A in Huntsville, we will grant Hicks' petition for reconsideration to the extent of this channel substitution. We find that such resolution is in the public interest, particularly because it permits a Class A allotment to Huntsville while removing Channel 235A as a barrier to the proposed upgrade in MM Docket No. 88-48 on Channel 235C2 at College Station. In any event, we recognize that there are two pending applications for Channel 235A at Huntsville filed during the cutoff period, which ended on December 22, 1988. Our engineering analysis has confirmed, however, that Channel 235A could be replaced by Channel 259A at either of the two sites proposed there and provide an equivalent service, thereby freeing up Channel 235C2 for consideration in MM Docket No. 88-48. The two parties will be permitted to amend their applications to specify Channel 259A, given that the two channels are equivalent. In accordance with Commission policy, we will retain the applicants' cutoff protection for Channel 235A when they amend their applications to specify Channel 259A. *See Salamanca, NY and Bradford, Pa.*, 50 FR 26208, June 25, 1985, and *Sanibel, Fla.*, 50 FR 32706, August 14, 1985. Therefore, Hicks' petition for reconsideration will be granted, and the *Order* will be reversed insofar as the allotment to Huntsville is concerned.

5. Accordingly, pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Section 0.61, 0.204(b), and 0.283 of the Commission's Rules, IT IS ORDERED That effective **June 12, 1989** the FM Table of Allotments, Section 73.202(b) of the Rules IS AMENDED with respect to the following community:

City	Channel No.
Huntsville, Texas	259A, 269A

6. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Hicks Communications, Inc. IS GRANTED to the extent indicated herein.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED a copy of this Order to the following:

Helen Maryse Casey
Route 2, Box 213
Huntsville, TX 77340
(File No. 881222MB)

Mildred D. Hall
1636 Whiskey Creek Drive
Fort Myers, FL 33919
(File No. 881221ME)

8. IT IS FURTHER ORDERED, That the Request for Stay filed by Hicks Communications, Inc. is DISMISSED as moot.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact J. Bertron Withers, Jr., Mass Media Bureau, (202)632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Accompanying its petition, Hicks also filed a request for stay of the *Order* to the extent it allotted Channel 235A to Huntsville, pending the final disposition of the petition. Radio U.S.A. filed an opposition to the request for stay to the extent that it might require a stay of the upgrade of Station KKYS(FM) in Bryan, Texas, also specified in the *Order*. Hicks filed a reply. Such a request is unnecessary since the requested stay is automatic under §1.420(f). We will dismiss Hicks' request for stay as moot.

[2] Contemporaneous with Hicks' filing of reply comments in MM Docket 88-48, it filed a Petition for Consideration of Counterproposal, contending that the allotment of Channel 235A in the instant docket was violative of the Commission's Rules and, thus, could not bar Hicks' counterproposal in MM Docket 88-48. The arguments made in that petition are virtually the same as those made in the instant docket. However, we will dispose of Hicks' petition in MM Docket 88-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

COMMUNICATIONS SATELLITE CORPORATION — CSG-89-032-P/L

For authority, pursuant to Title III of the Communications Act of 1934, as amended, to construct and operate a Ku-band antenna in Washington, D.C. in order to provide control and coordination circuits between INTELSAT Headquarters facilities and several tracking, telemetry, command and monitoring earth station sites in the Atlantic Ocean Region

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: April 19, 1989; Released: April 27, 1989

By the Chief, International Facilities Division:

1. On December 12, 1988, Communications Satellite Corporation (Comsat) filed the above-captioned application requesting authority to construct and operate a 12/14 GHz Ku-band earth station[1] at Washington, D.C. for use in providing control and coordination circuits between INTELSAT headquarters facilities and several overseas telemetry, tracking, command and monitoring (TTC&M) earth station sites. The application was placed on public notice January 4, 1989. No comments were received. We grant the application for the reasons set forth below.

2. Comsat states the INTELSAT Satellite Control Center (SCC) and the INTELSAT Operations Center (IOC) comprise the hub of a network of several international earth stations which are linked by voicegrade bearer circuits for purposes of carrying telemetry, monitoring and time division multiple access (TDMA) control information and engineering service circuits to coordinate the services carried on the INTELSAT system. There are presently 79 such control and coordination circuits, Comsat notes, adding that when the INTELSAT VI satellites come into operation in 1989, the number will increase to about 115.

3. Although the existing circuits have proven acceptable, Comsat states, improved performance is required in the future because of the higher data rate and larger volume of critical telemetry data associated with the INTELSAT VI satellites. This improvement could be achieved by conversion of the present analog circuits to digital transmission and substantial savings could also accrue to INTELSAT if, concurrent with this conversion, access were provided to SCC and IOC through links using two Ku-band antenna systems at INTELSAT headquarters in Washington, D.C. accessing Atlantic Ocean Region (AOR) satellites at 325.5 and 335.5 degree East Longitude, Comsat explains. Comsat states two antennas are required for protection against complete loss of data in the event of failure of either path.

4. According to Comsat, INTELSAT proposes immediately to locate one of the two antennas at its headquarters and at a later date to locate another antenna either there or at a nearby site yet to be determined. Comsat adds that the Department of State has determined that the operating license for INTELSAT's antenna must be held by a U.S. common carrier and that Comsat has agreed to participate as the U.S. common carrier for the purposes of obtaining and holding the requisite authorizations from the Federal Communications Commission. Comsat states it has offered to provide this service as a courtesy and at no charge to INTELSAT.

5. The applicant proposes, on behalf of INTELSAT, to procure an INTELSAT Standard E-2 earth station to be located at the site of INTELSAT headquarters in Washington, D.C. Comsat states the antenna will meet all present and planned control coordination circuit requirements for communications between INTELSAT headquarters and several INTELSAT TTC&M and TDMA reference and monitoring services (TRMS) sites. Comsat projects the antenna will begin operation in mid-1989.

6. Comsat states the capital, operating and maintenance costs for this earth station will be paid for by INTELSAT pursuant to contract and will not be reflected in any Comsat tariff.

7. Upon review of the applications, we find Comsat's plan to install a control and coordination antenna at INTELSAT headquarters will allow the increase in control and coordination circuits that will accompany the operation of the INTELSAT VI satellites. The operation of the proposed facility will provide INTELSAT with the ability to upgrade and increase its control and coordination circuits which will be necessitated by the operation of the INTELSAT VI satellites. The proposed construction will not adversely affect the environment and the antenna will comply with all applicable rules.

8. We therefore conclude that it would serve the public interest to allow Comsat to construct and operate a 12/14 GHz Ku-band earth station at Washington, D.C. for use in providing control and coordination circuits between the INTELSAT headquarters facilities and several overseas telemetry, tracking, command and monitoring earth station sites.

9. Accordingly, IT IS ORDERED that applications, File No. CSG-89-032-P/L IS GRANTED pursuant to Sections 304, 308, 309 and 319 of the Communications Act of 1934, as amended, 47 U.S.C. 304, 308, 309 and 319 and Section 305 of the Communications Satellite Act of 1962, as amended and Comsat is authorized to construct and operate a 6.1-meter Ku-band (14.0-14.5 GHz and 10.95-11.95 GHz) antenna meeting INTELSAT Standard E-2 earth station technical parameters, located at INTELSAT headquarters in Washington, D.C. for communications between INTELSAT headquarters and several INTELSAT TTC&M and TRMS sites in th AOR.

10. Before completion of equipment installation and facility activation, however, the applicant shall provide the Commission with a summary of equipment which was actually installed.

11. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] The application is filed pursuant to Sections 304, 308, 309 and 319 of the Communications Act of 1934, as amended, and Section 305 of the Communications Satellite Act of 1962 as amended.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-328[1]

In the Matter of
Revision of Application for
Construction Permit for
Commercial Broadcast Station
(FCC Form 301)

REPORT AND ORDER

Adopted: March 30, 1989; Released: April 20, 1989

By the Commission:

INTRODUCTION

1. The *Notice of Proposed Rule Making* in this proceeding sought comment on portions of a proposal by an *ad hoc* committee of the Federal Communications Bar Association (FCBA) to revise the basic broadcast station application form, FCC Form 301, to require the submission of additional information from applicants for construction permits for new commercial broadcast stations.[2] Specifically, the *Notice* sought comment on FCBA proposals requiring the submission of additional financial, ownership and integration information. We also sought comment on whether we should amend our financial qualification requirements. The purposes of these proposals were to discourage the filing of sham or abusive applications, facilitate early settlement of competing applications, and expedite the processing and the adjudication of the applications. The majority of the twenty-eight comments filed in the two proceedings which addressed the issue supported the proposed amendments to Form 301.[3] Based on our review and analysis of this record and our experience, we hereby amend Form 301 to require the submission of additional financial, ownership and integration information as proposed by the FCBA, and make certain other related changes.[4]

BACKGROUND

2. FCC Form 301 is the application form for construction permits for commercial broadcast facilities.[5] It is used to apply for authority to construct new commercial AM, FM or TV broadcast facilities, including facilities that are mutually exclusive with those that are subject to license renewal.[6] In 1981, we revised FCC Form 301 to reduce substantially the amount of information and documentation required to file an application for a permit to construct a broadcast station.[7] Our goal was to eliminate requirements for "out-of-date, burdensome or superfluous" information and to streamline and expedite the application process.[8] Among other things, we eliminated the requirement that applicants submit an itemization of projected expenditures and sources of funds, and replaced it with a requirement that applicants merely certify that they have sufficient funds to construct and operate the requested broadcast facility for three months.[9] We also eliminated the sole question that, in general, generated information about an applicant's integration proposal.[10]

3. In 1984, we modified Form 301 to conform with our revised ownership attribution standards.[11] In so doing, we no longer required information on Form 301 with respect to "insulated" limited partners and certain voting and nonvoting stockholders. Moreover, the Commission eliminated a question asking applicants to identify documents or understandings relating to ownership or future ownership rights.

4. The FCBA believes that these modifications to Form 301 left critical voids in the information submitted by applicants. It contends, among other things, that the relaxed application requirements have fostered the filing of sham or speculative applications. To address these problems, the FCBA formed an *ad hoc* committee to develop proposed modifications to Form 301. Specifically, the FCBA proposed the following changes:[12]

Modify Section II of Form 301 to:

(1) require corporate and limited partnership applicants to specify the date and location of filing of articles of incorporation and certificates of limited partnership;

(2) require the identification of all equity owners in the applicant, including general and limited partners and voting and nonvoting shareholders; and

(3) require the identification of documents, contracts or understandings related to ownership or future ownership rights in the applicant.

Modify Section III of Form 301 to:

(4) require the estimated cost of constructing and operating the station for the first three months, and the identity of the sources of funding, including the source's name, address, telephone number, relationship to the applicant, and amount;

(5) replace the current instructions to Section III with essentially the same instructions formerly included as page 4, Section III.

Modify Section IV of Form 301 to:

(6) require identification of each principal who will participate in the management of the proposed facility, his or her position, duties and hours, and for each principal, whether a qualitative credit will be claimed for minority status, past local residence, daytimer preference, female status, broadcast experience, or civic activity.

5. In the *Notice*, we requested comment on each of these proposed amendments. We also requested comment on whether the Commission should change its standard for evaluating the financial qualifications of applicants from a "reasonable assurance" standard to a "firm financial commitment" standard, similar to that adopted at the application stage in the rural cellular radio service. We requested comment on these same proposed reforms in a

concurrent proceeding (BC Docket No. 81-742) related to reform of our comparative renewal procedures (*Comparative Renewal*). [13] In its treatment of Form 301 issues, the present proceeding is broader than our *Comparative Renewal* proceeding from the standpoint of applying to applications for authority to construct new stations as well as applications mutually exclusive with those subject to renewal. Based on the foregoing, we have decided to incorporate into the record of this proceeding those comments submitted in response to our *Comparative Renewal Notice* pertaining to Form 301 amendments in the license renewal context. Moreover, the issues raised in that *Notice* regarding strengthened Form 301 requirements in the comparative renewal context will be decided in this proceeding.

COMMENTS

6. Of the ten comments timely filed in this proceeding, six supported in full those FCBA proposals on which we requested comment:[14] two supported those proposals in part with no comment on the remainder:[15] and one agreed that changes should be made in Form 301 without specifying the changes.[16] Only one commenter, Barry Skidelsky, Esq. (Skidelsky), opposed parts of the FCBA proposal. Of the commenters responding to our proposal to strengthen the standard by which we judge financial qualifications, the majority support our current "reasonable assurance" standard.[17] The specific comments are discussed with regard to each of the proposed changes.

7. *Date and Place of Incorporation*. With one exception, all the commenters who addressed this issue advocate requiring an applicant that is structured as a limited partnership or corporation to give the date and place of filing of its certificate of limited partnership or articles of incorporation.[18] The parties assert that this requirement will emphasize the importance of being a formally organized entity before filing, and discourage the use of phony corporate or partnership structures to file applications. They further assert that early access to information contained in these documents will help expose and deter non *bona fide* applicants. Skidelsky, the only commenter who objected to the proposal, cites our statement in the *Notice* that this requirement may "encourage additional litigation over minor corporate imperfections without curbing abusive practices."[19]

8. *Identity of All Equity Owners*. All commenters who addressed this issue would require identification of all equity owners in the applicant, including general and limited partners and voting and nonvoting stockholders.[20] The commenters argue that ownership information material to a comparative hearing is much broader in scope than ownership information relevant under the attribution standards. Commenters assert that this additional ownership information helps identify the real party filing the application, thereby allowing other applicants to know the true owner at the application stage. Commenters argue that this helps applicants evaluate the merits of their applications for settlement purposes. Commenters also assert that nonattributable ownership information is generally discovered during a comparative hearing. They reason that requiring this information in the application stage merely advances disclosure, rather than placing a new burden on the applicants.

9. Several of the parties supporting the proposal made various suggestions to prevent this requirement from being burdensome for publicly held entities. The FCBA and CBS advocate a reduced disclosure requirement for corporations or partnerships with more than 20 stockholders or equity owners. Those entities would only have to identify all officers and directors and those who own or vote or who have subscribed to more than 5% of the stock or partnership equity.[21]

10. *Ownership Contracts and Documents*. All commenters who addressed the issue support FCBA's proposal to require identification of documents, contracts or understandings related to ownership or future ownership rights in the applicants.[22] The parties generally agree that such information is essential to identifying the real party-in-interest behind the application, and preventing the filing of sham applications. FCBA further asserts that, in most comparative cases, the real party-in-interest issue is fully explored and litigated at hearing.[23] FCBA asserts that disclosure of this information at the application stage would save the litigants' and Commission's resources by making discovery proceedings simpler and less time consuming, and hearings shorter.

11. *Costs; Source and Amount of Funds*. With one exception, all commenters who addressed the issue advocate reinstituting the requirement that applicants itemize or state the estimated cost of, and identify, the source and amount of funds for operating the broadcast facility for the first three months.[24] Commenters generally assert that this requirement will prevent applicants from falsely certifying that they have funding, and prevent financially unqualified entities from filing applications. They further assert that this will reduce the need for discovery and litigation over false certification and financial qualifications issues. Commenters argue that the additional requirement of itemizing costs and identifying funding sources should impose little additional burden on those applicants who have truthfully certified that they are financially qualified. Skidelsky, the only commenter who objects to this requirement, argues that requiring applicants to identify their sources of funds "might serve as yet another impediment to *bona fide* entrepreneurs." He also noted that FCC filings might be used as "prospect lists" by outside promoters that are searching for a source of funds, thus, causing private broadcast investment to become scarce.[25]

12. *Financial Qualification Standard*. Under our current policy, an applicant must have "reasonable assurance" of funding to certify that it has sufficient funds to construct and operate the requested facility. Failure to certify may result in rejection of the application (for a commercial FM station) or designation for hearing (for the remaining services).[26] We asked for comment on whether the financial qualification standard should be strengthened to a "firm financial commitment" standard similar to that adopted at the application stage for the rural cellular radio service. The majority of parties who addressed the issue, including the FCBA and CBS, support the "reasonable assurance" standard.[27] They assert that a firm commitment standard would create a barrier to entry for minorities and other broadcast entrepreneurs by making it more difficult and expensive (because of commitment fees) for applicants to become financially qualified. NAB advocates a "reasonable assurance" standard for applicants for permits to construct *new* facilities, but would impose a "firm financial commitment" standard on applications

filed against license renewals. NAB asserts that the more stringent standard is justified to insure that an incumbent licensee is not replaced by a competing applicant who cannot afford to operate the station.[28] Booth would impose a firm financial commitment standard on all applications to eliminate unqualified applicants.[29]

13. *Integration Proposal.* Again, with one exception, the commenters who addressed the issue would require an applicant to provide integration information for each principal who will be involved in management of the proposed broadcast facility. Commenters assert that this information will enable competing applicants to judge the relative merits of the integration proposals at an early stage in the comparative process. This will in turn encourage settlements prior to a costly, time consuming comparative hearing. Skidelsky objected to the disclosure of the applicant's integration proposal because "[a]dditional boiler-plate will only encumber the process and not better deter abusive practices."[30]

14. *Comments in BC Docket 81-742.* The commenters in BC Docket 81-742 overwhelmingly supported strengthening filing requirements for competing applications in the license renewal context. The clear majority of commenters who addressed the issue urged the Commission to require more information in applications filed against license renewals.[31] With a few exceptions,[32] these commenters generally supported the same modifications to Form 301 proposed by FCBA. They asserted, among other things, that requiring more information will deter and uncover sham and unqualified applicants at the filing stage, thereby facilitating early settlement of applications.

DISCUSSION

15. Our goal in modifying Form 301 in 1981 was to streamline and expedite the application process by removing out-of-date, burdensome, or superfluous reporting requirements. In so doing, we hoped to aid the applicant in preparing its application and facilitate the processing of the application by the Commission staff. We believe that our original goal was and still is sound policy. However, based upon our experience in the intervening eight years, and a careful review of the record in this proceeding and in BC Docket No. 81-742, we now recognize that these reforms have had unintended results that are not necessarily in the public interest.

16. As discussed in detail below, we now believe that streamlining the application process may have facilitated the filing of applications by financially unqualified, sham and/or abusive applicants and made it more difficult to detect such applicants once they are in a comparative proceeding. By financially unqualified applicants we mean those who do not have sufficient net liquid assets on hand or committed sources of funds to construct and operate the proposed facility for three months. By sham applicants, we mean the use of a legal entity (such as a partnership or corporation) to conceal the real party-in-interest behind the applicant in order (1) to gain some type of comparative advantage, or (2) to avoid application of a Commission rule or policy. By abusive applicant, we mean an applicant who uses the Commission's application process to achieve a result the process was not designed or intended to achieve, or one who uses the process in a manner which subverts the underlying purpose of that process. For example, an applicant who files -- not for the legitimate goal of obtaining a construction permit -- but for the purpose of extracting a large settlement payment from another competitor in exchange for dismissing an application is abusing our application process.

17. The presence of these types of applicants in our application process takes a serious toll on service to the public. In the new license context, it increases the resources devoted to processing and may actually delay the initiation of new service to the public. In both the new and renewal context it makes the application process more costly and time consuming. Competitors may be required to expend considerable amounts of money to compete against and pay off financially unqualified applicants who have no real intention of owning or operating a station. In addition, the presence of unqualified, sham or abusive applicants in our comparative proceedings undermines the integrity of our processes. Competitors may be forced to litigate against a sham applicant set up to gain a favorable integration preference or to hide a real party who would not otherwise be entitled to a construction permit under Commission rules.

18. To make it more difficult for these non *bona fide* applicants to enter and remain in our permit application process, we are revising the filing requirements along the lines proposed by the FCBA and in the *Notice*. These revised filing requirements apply to all entities who must file a Form 301 application for authority to construct new facilities or facilities mutually exclusive with those subject to renewal. Below we describe in greater detail the problems created by the specific gaps in Form 301 and the benefits we expect to achieve with each amendment. In general, however, we believe the strengthened filing requirements will help keep non *bona fide* applicants out of our permit application process and permit early identification of such applicants who enter the process. This will, in turn, preserve the integrity of our process, conserve applicant and Commission resources, and ensure that resources are not diverted from service to the public. An additional benefit is that competitors, armed earlier with more complete information, will be better able to evaluate the relative merits of their applications.

A. Ownership Information

19. In 1984, we modified our ownership attribution standards to provide that certain equity holders would be considered "attributable" owners of broadcast facilities for purposes of applying our multiple ownership rules.[33] At the same time, we modified Form 301 to conform to our revised ownership attribution standards.[34] Pursuant to our current instructions in Form 301, persons or entities who hold nonattributable equity interests are not considered parties to the application and, therefore, with limited exceptions,[35] applicants need not identify or provide information about these non-parties. Specifically, applicants are not required to identify: (1) limited partners where the applicant certifies that the limited partners "will not be involved in any material respect in the management or operation of the proposed station,"[36] (2) nonvoting stockholders, (3) stockholders who are not officers or directors and have less than 5% voting stock interests, and (4) stockholders who are not officers or directors and have less than a majority interest in voting stock where a single entity owns more than 50% of the voting stock. To further conform to our attribution rules, we modified

Form 301 in 1986 to remove the requirement that applicants identify documents or instruments relating to ownership or future ownership rights in the applicant.

20. At the time we modified Form 301 to conform to our attribution rules, "we could perceive no legitimate regulatory purpose to be served by the routine submission of information beyond the scope of [our] attribution benchmark . . . ."[37] We now believe, based on our experience and the record in this proceeding, as well as in our *Comparative Renewal* proceeding, that a crucial regulatory purpose *is* served by requiring more information in the construction permit application than is relevant under our multiple ownership rules.

21. We have been faced with an increasing number of cases in which real parties-in-interest seek construction permits through sham corporate or partnership applicants. In *KIST Corp.*,[38] for example, we affirmed the Review Board's denial of an integration credit to an applicant where 95% of its stock was held by a minority female. The Board found she was not the true and actual owner for integration purposes. Rather, it found the 5% stockholder, who made a gift of 95% interest in the corporation to the minority female, guaranteed the bank loan and provided $70,000 to prosecute the application, was the real owner for integration purposes. Similarly, integration preferences have been denied in several other cases in which it was determined that an applicant's organizational structure was erected to take advantage of a comparative preference.[39] While the *KIST* 5% shareholder holds an attributable interest and would therefore be identified in a Form 301 application, a 4% shareholder, who need not currently be identified, could easily perpetrate the same scheme.

22. There is the potential for similar abuse in limited partnership arrangements. In *Louisiana Super Communications Ltd.*,[40] for example, the Review Board discounted an integration preference to a female general partner where it became evident that the limited partner would have complete control over the operation and management of the partnership.[41] This type of sham application often is difficult to detect under current filing requirements. An applicant need not identify a limited partner if it certifies that the limited partner will not be involved in any material respect in the management or operation of the proposed station. Once the applicant has so certified, the Commission does not generally inquire into, or have readily available information that would suggest the need to inquire into, the veracity of this statement. Moreover, little information is available from the application to enable competing applicants to challenge the certification.

23. Persons can also use sham corporations or partnerships to submit applications they would otherwise be precluded from filing under our rules. For example, a person who was previously disqualified as a licensee or is in a position to exceed our multiple ownership rules can use a sham entity to file an application that would otherwise be rejected.[42]

24. Finally, we are aware of the potential for abuse where limited partners fund numerous applications. NAB described this potential in the renewal context:

> [U]nder the current rules, parties can file numerous applications against various renewal applicants by simply changing their corporate or partnership names. Because such limited partners or other non-attributable ownership need not be listed on FCC Form 301, these applicants can pool resources to form companies designed to reap settlement bonanzas. These "investors," often with "settlement lawyers" at the helm, act as a gang of settlement buccaneers, sailing from state to state as the Commission's renewal deadlines come due across the nation.[43]

25. Our current FCC Form 301 does not adequately foreclose unscrupulous applicants from perpetrating these and other types of abuse. Nor does our Form 301 provide sufficient information to permit identification of such abuses. The commenters repeatedly asserted that more ownership information will aid in identifying the real party-in-interest behind the applicant and prevent such persons from using sham applicants to gain some type of comparative advantage, or to avoid application of a Commission rule or policy. Since the Commission does not have resources sufficient to permit it to examine the *bona fides* of every application submitted, we are compelled to rely on competitors to detect and expose sham applications. Accordingly, we will require applicants to submit additional ownership information with their application. Specifically, applicants must (1) provide the date and place of filing of the applicant's enabling charter (*e.g.*, its articles of incorporation or certificates of limited partnership), (2) identify all holders of nonattributable equity interests in the applicant except where there are more than 50 owners of equity interests, and (3) identify and submit future ownership contracts or agreements.

26. *Date and Place of Incorporation.* We currently permit the applicant to state its legal structure (*i.e.*, limited partnership, corporation, etc.), but we do not require submission of either the underlying legal documents or the date and place of filing of the legal documents. The legal structure of the applicant is significant because it defines who is a party to the application.[44] The applicant must identify and provide Section II information (*i.e.*, number of shares or partnership interests, number of votes, percentage of votes, attributable media interests, or other ownership interests) for each party. For example, as discussed previously, an applicant need not identify a limited partner if it certifies that the limited partner is insulated, *i.e.*, will not be involved in any material respect in the management or operation of the proposed station. In the instructions to Form 301, we list numerous criteria which, if contained in the limited partnership agreement, would assure that a limited partner is sufficiently insulated. However, we do not require production or identification of this agreement. Consequently, we provide no basis for parties to the proceeding to verify that the applicant has actually formed a partnership, that a partnership agreement exists, that the representations in the application are consistent with the agreement, or that it contains safeguards to insure that a limited partner is sufficiently insulated.

27. To remedy this, we will amend Section II of Form 301 to add the following requirement:

> If the applicant is not an individual,[45] provide the date and place of filing of the applicant's enabling charter (*e.g.*, a limited partnership must identify its certificate of limited partnership and a corporation

must identify its articles of incorporation by date and place of filing):

Date _____ Place _____

In the event there is no requirement that the enabling charter be filed with the state, the applicant shall include the enabling charter in the applicant's public inspection file.

28. We believe that requiring applicants to provide this information in Form 301 will discourage sham applications. First, parties that choose to file in other than an individual capacity must formalize their legal status before stating it on the application. Because of the paperwork and administrative formalities involved in setting up and maintaining a *legal* corporation or partnership, persons may be deterred from legally formalizing sham entities which they have created as fronts for applications. This should particularly deter parties from filing multiple applications through multiple sham entities. Requiring this information will also force applicants to commit to a legal structure, which can thereafter serve as a benchmark for other applicants to investigate and test the validity of representations made in the application. The availability of these legal documents, on file with the relevant state or in the public inspection file of the applicant, will enable the parties, early in the proceeding, to make a threshold determination as to the *bona fides* of the applicant's ownership information.

29. Applicants who have already established corporations or partnerships will not be significantly burdened by merely having to state the date and place of filing of its legal documents. We note the burden involved in establishing a legal corporation or partnership before filing, but do not believe that this requirement will keep *bona fide* applicants or entrepreneurs from seeking valuable construction permits. First, entrepreneurs can file applications as individuals to avoid this burden. Moreover, for those who wish to file through a corporation, partnership, or other legal entity, such entities can be established relatively easily, and the filing fee and other costs involved are minimal in comparison to the valuable broadcast license at stake. In our *Notice*, we also questioned whether, because of the ease with which a partnership or a corporation may be established, this requirement would "encourage additional litigation over minor corporate imperfections without curbing abusive practice."[46] Upon further reflection, we now believe that this requirement will spawn no more litigation of this type than already occurs. Under our current procedure, these corporate and partnership documents are often produced through discovery during the comparative hearing. Under our new procedure, we are requiring information that will permit parties to obtain these documents at the application stage rather than the discovery stage. We can see no reason why providing access to the documentation at the application stage, rather than requiring production of the documentation at the hearing stage, will encourage additional litigation over the legal nature of the applicants.

30. *Identity of All Equity Owners.* As demonstrated by the record in this proceeding and by cases such as *KIST* and *Louisiana Super Communications Ltd.*, real parties-in-interest, under current procedures, may conceal the extent of their ownership of applicants through sham partnerships and corporations and thereby obtain comparative preferences or evade Commission scrutiny.

31. To permit identification of these real parties-in-interest, we conclude that, but for the exception discussed below, all equity owners in the applicant, including non-party equity owners, must be identified and will be subject to the disclosure requirements in Section II of Form 301. Accordingly, the following persons, not subject to disclosure in Form 301 under our current policy, must now be identified: limited partners, nonvoting stockholders, stockholders with less than 5% voting stock interest and stockholders with less than a majority interest in voting stock where a single entity owns more than 50% of the voting stock.[47]

32. We are concerned, of course, that a proper balance be struck between our goal of requiring identification of equity owners for abuse purposes and our desire to avoid overly burdensome reporting requirements. We recognize that it may be burdensome for widely held entities to submit information regarding all equity holders. In order to reduce this burden, we are adopting a modified filing requirement for entities with more than fifty (50) equity holders. If there are more than fifty stockholders, partners, or owners of equity interests in an applicant, only persons or entities who own, vote, or subscribe to more than 5% of the equity in the applicant, as well as all officers and directors, need be listed in the application.[48] Drawing the line at fifty is consistent with previous decisions in which we distinguished between widely- and closely-held entities to alleviate reporting requirement burdens.[49] We believe that limiting our reporting requirement in this manner strikes an appropriate balance between relieving the burden on large entities of providing information regarding all equity holders, and providing adequate information for the public, the Commission, and competing applicants to expose real parties behind sham applicants.

33. We recognize that we have previously determined that the identity of these holders of nonattributable interests is generally not relevant for purposes of applying our multiple ownership rules,[50] or for purposes of determining a diversification or integration preference in a comparative hearing.[51] The normal assumption behind these determinations is that these ownership interests do not confer on their holder the degree of influence or control over the licensee that justify subjecting it to limitation under our multiple ownership rules,[52] or subjecting it to scrutiny in applying our diversification or integration factors in a comparative hearing.[53] Where there is no sham, these assumptions are valid, and a holder of a nonattributable interest is simply not relevant for comparative purposes. Where there is a sham, however, the assumptions underlying our attribution policies do not apply. In such cases, a real party-in-interest, *i.e.*, a person with a *substantial* degree of influence and control, presents himself as a holder of a nonattributable interest, which under our attribution assumptions means he has *minimal* influence and control. Thus, where there is the potential for abuse, as we have found in our application process, we need to require disclosure of holders of assertedly nonattributable interests to ensure that they are truly nonattributable, *i.e.*, that they are not exercising control over the applicant. Requiring disclosure of nonattributable interests for this purpose in no way undermines the policies behind our attribution rules.

34. Identification of all equity owners in the applicant, with the exception noted above, will, we believe, help deter parties from filing license applications behind sham corporate and partnership entities at the outset. Disclosure of such information will help permit early identification of sham entities that do file. This in turn will result in the appropriate sanction against the applicant (*i.e.*, no integration preference, disqualification, or designation of issues against the applicant), and may also prompt early dismissal of such applications.

35. We recognize that this requirement poses an additional burden on applicants. However, we believe this burden is far outweighed by the public interest benefit of deterring abuse. Moreover, as discussed above, we are limiting the reporting requirements for large corporate and partnership entities to ensure that the requirements do not become overly burdensome.[54]

36. *Ownership Contracts and Documents.* We currently have no mechanism in our application process for identifying those persons or entities who have contracts or written or oral understandings regarding future ownership rights in Form 301 applicants.[55] The potential for abuse through such agreements is clear. A person could file a sham application to gain integration or diversification preference or to insulate himself from scrutiny with the understanding that once a settlement is reached, or a permit is granted, he will have a right to ownership interests in the applicant.[56]

37. To address this potential for abuse, we will amend Form 301 to add the following question to Section II:

> Are there any documents, instruments, contracts or understandings (written or oral), other than instruments identified in response to paragraph 3, Section II of Form 301, relating to future ownership interests in the applicant, including but not limited to, insulated limited partnership shares, nonvoting stock interests, beneficial stock ownership interests, options, rights of first refusal, or debentures?
>
> Yes _____ No _____
>
> If "Yes", submit all such written documents, instruments, contracts or understandings, and provide the particulars of any oral agreement in Exhibit No._____ .

We believe this question will help deter abuse by (1) discouraging persons from entering into contracts or understandings relating to future ownership in the applicant in order to evade Commission review; and (2) providing parties with the facts to identify this type of scheme, if it exists. It is clearly in the public interest to prevent the use of future ownership agreements that enable the real party behind the applicant to completely avoid Commission scrutiny. While it may be burdensome for those applicants that have such agreements to produce or describe them, this is clearly outweighed by the public interest benefits of requiring the necessary information to permit identification of all real parties-in-interest in a comparative proceeding.

38. In sum, we do not envision an appreciably increased burden on the Commission's processing staff to review the additional ownership information supplied by applicants. The staff will follow its current procedure of not looking behind an applicant's responses which are sufficient on their face.[57] Rather, in order to conserve our administrative resources, we will rely on competing applicants to scrutinize the specific data supplied by other applicants and bring to the attention of the ALJ, through motions to enlarge issues, any significant problems revealed by that information. Where an applicant fails to provide the additional ownership data required in the application, the hearing designation order will include an issue regarding the real party-in-interest in the applicant and will direct that the relevant information be supplied to the Administrative Law Judge (ALJ), by amendment of the application, within a specified time from the date of the designation order. In considering motions to enlarge issues concerning ownership matters, the presiding officer in a comparative proceeding should not construe the absence of an ownership-related issue in a hearing designation order as ruling on the acceptability of the information supplied.[58] We retain, of course, the right to specify an issue, or take such other appropriate action, where the application reveals on its face a violation of a Commission policy or rule, such as an entity's listing of holdings which reflect attributable interests in excess of those permitted by our ownership rules.

B. Financial Qualifications.

39. In 1981, we adopted the present financial certification procedure for applicants for construction permits.[59] Under this procedure, applicants are merely required to certify that "sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue."[60] We adopted this procedure in lieu of a requirement that applicants itemize the costs of constructing and operating the facility and document, with reasonable assurance, the availability of the funds itemized. We believed that the certification procedure would expedite the processing of applications, and reduce the burden on the applicant and on the Commission staff.[61] We stressed that, in adopting the certification requirement, we were not modifying the basic substantive financial requirement, *i.e.*, that the applicant have the ability to construct and operate the proposed station for three months, nor were we changing the factual basis for meeting that requirement.[62]

40. After a number of years of experience with this certification procedure, we recognize that it has led to an increase in applications filed by entities that were financially unqualified at the time of filing. In a 1987 *Public Notice*, we noted:

> . . . after five years of experience with the financial certification requirement in lieu of documentation, it is clear that a number of broadcast construction permit applicants have certified their financial qualifications without any basis or justification. [Footnote omitted.] Such false certifications . . . waste the resources of both the Commission and legitimately qualified applicants. As a consequence, the public may receive delayed service, substandard service, or no service at all.[63]

41. To attempt to counter this abuse, we initiated a program of random checks of financial qualifications.[64] Our use of random financial checks has succeeded in

uncovering instances of what appear to be false financial certification,[65] but it has not sufficiently deterred applicants from falsely certifying their financial qualifications.[66] Once an applicant checks it is financially qualified, there is usually no basis for the staff or the ALJ to designate a financial issue, nor is there generally a basis for any other party to seek discovery on financial qualifications. Consequently, unless such an applicant mistakenly testifies about financial issues during the course of other discovery, or other intrinsic evidence is presented, financial qualifications cannot be an issue at the hearing. Given the comments in this and the *Comparative Renewal* proceeding, and our own experience, we continue to have concerns that applicants are misrepresenting their financial qualifications. Moreover, based on the record developed here, as well as in the *Comparative Renewal* proceeding, we now recognize that this certification procedure has also facilitated the filing of applications merely to exact settlement payoffs rather than for the legitimate purpose of obtaining a broadcast license. Indeed, for an applicant that expects to settle rather than prosecute its application, a simple certification provides little incentive to evaluate financial requirements carefully.

42. Accordingly, we are strengthening our financial certification requirements. First, we are retaining our current certification question which requires an applicant to check a "Yes" or "No" box in response to the statement "The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue."[67] To provide some check to ensure that applicants have carefully considered the financial requirements and correctly certified their financial qualifications, however, we are requiring that applicants submit additional information. Specifically, we are amending Section III of Form 301 by adding the following questions:

> 1. State the total funds you estimate are necessary to construct and operate the requested facility for three months without revenue: $_____.
>
> 2. Identify each source of funds, including the name, address and telephone number of the source (and a contact person if the source is an entity), the relationship (if any) of the source to the applicant, and the amount of funds to be supplied by each source.

43. An applicant fulfills the first reporting requirement by stating the total estimated cost of constructing and operating the requested facility for three months. An applicant fulfills the second reporting requirement by identifying sufficient funding sources to match the estimated cost. The funding sources can include, but are not limited to, existing capital, new capital, bank loans, profits from existing operations, or deferred credit from equipment suppliers. Each funding source must be clearly identified by name, address, telephone number, contact person (if an entity), relationship to the applicant (if any), and amount of funds to be supplied by each source. We emphasize that we are not returning to our pre-1981 reporting requirements, and we are not requiring the applicant to *submit* underlying documentation to verify its cost estimate or funding sources. However, as we did prior to 1981, we are now requiring that the applicant *have* such information and documentation on hand at the time it submits the application. We stress that when the applicant checks the box on Form 301 that it is financially qualified, it must have *at that time* sufficient liquid assets in excess of current liabilities and/or sufficient funds available from committed sources to construct and operate the facility. To provide guidance to the applicants on compiling the estimate and on the funding information an applicant will now be required to have on hand at the time it files an application, we are adding to our current instructions in Section III of Form 301 the instructions formerly used by the Commission to elicit financial qualifications information and documentation.[68]

44. In addition, in order to deter further financially unqualified applicants from participating in the application process, we are adopting a modified version of the "firm financial commitment" approach on which we sought comment in both the *Form 301* and *Comparative Renewal Notices*. Similar to non-wireline rural cellular applicants,[69] broadcast applications will now be returned as "not substantially complete" if the requisite financial certification is not made in the application.[70] Specifically, if an applicant fails to certify in the application that it is financially qualified (*i.e.*, if it does not respond to the question or checks "No"), its application will be returned as unacceptable or non-tenderable pursuant to 47 C.F.R. § 73.3564.[71]

45. We are not at this time, however, adopting the more substantive aspect of the "firm financial commitment" approach, which is opposed by most of the commenters addressing this issue. The standard for evaluating the availability of funds for broadcast applications will continue to be the "reasonable assurance" standard rather than the stricter "firm financial commitment" standard. We note, however, that the Commission is considering adoption of the "firm financial commitment" standard in full in MM Docket No. 89-15.[72] We will therefore hold open that portion of this proceeding and BC Docket No. 81-742 pertaining to the "firm financial commitment" standard pending the completion of that inquiry.

46. With regard to the new financial information we are requiring (*i.e.*, estimated cost and funding sources), if there is a facial quantitative deficiency -- failing, for example, to state the estimated cost of constructing and operating a station or failing to identify adequate funding sources to cover the estimated costs -- the staff will designate an appropriate issue against the applicant to be resolved in the hearing process. If, on the other hand, the information provided raises questions as to whether it is qualitatively defective, such as an arguably inadequate cost estimate, the processing line staff will generally leave to competing applicants and the hearing process the resolution of such an issue.[73] We reserve the right, however, to designate an issue or take such other action in connection with a defective showing as may be appropriate. We will undertake our evaluation of the newly required financial data so as to minimize processing staff involvement, relying to the extent possible, on the efforts of competing applicants to function as effective checks on the claims of other applicants.

47. The benefits of requiring this additional financial information are numerous. First, it will ensure that unqualified applicants do not evade review. As we noted above, under our current procedure, discovery into an applicant's finances is not permitted if the applicant has certified that it is financially qualified and a financial

issue is not designated. Requiring this additional information permits us, as well as the parties themselves, to make attempts to independently verify the certification, and move (post designation) to enlarge the issues at the hearing to include financial issues where indicated.

48. Second, we believe that requiring this additional financial information will help to deter unqualified applicants from entering the comparative process. Prior to this change, applicants who had not been able to line up their funding by the time they were required to file could certify that they were qualified with little risk of detection. Now such applicants should be deterred from filing an application. If an applicant is financially unqualified, it must check "No," in which case its application will be returned as unacceptable or non-tenderable for filing. Any applicant who knowingly is not financially qualified but deliberately checks "Yes" subjects itself to a potential misrepresentation as well as a financial issue at the hearing. Due to the additional financial information required, such false certifications are more likely to come to the Commission's attention. The misrepresentation issue, if not resolved favorably, could be relevant to every subsequent application that party may file.[74] This possibility should be a strong deterrent to false financial certifications in applications.

49. Third, in addition to discouraging financially unqualified applicants, we believe that these reporting requirements will discourage those applicants who may be filing an application merely to exact a quick payoff. If an applicant must line up funding sources, identify them in detail and have underlying documentation in hand, it may be less likely to file an application merely to negotiate a settlement.

50. Finally, the reporting requirements may also encourage early dismissal of weak applications. The parties will now know early in the process those applicants who have filed despite questionable financial qualifications. Such applicants may be motivated to withdraw at a prehearing stage rather than risk defending against either a financial qualification or misrepresentation issue.

51. These new filing requirements impose a small additional burden on applicants. For those applicants who properly complied with our previous certification standard, however, the increased burden is not great. As we stated earlier, our new requirements to estimate the cost of construction and operation and identify funding sources do not substantively expand the applicant's responsibilities under our previous certification standard. Before an applicant could certify that it was financially qualified in Form 301, it was required to estimate the cost, secure funding, and have the documentation available to be provided upon request.[75]

52. While those applicants who falsely certify their financial qualifications, or certify that they are qualified without documentation on hand, will incur an additional burden in complying with our new reporting requirements, we believe this additional burden is justified. First, it now forces them to comply with previously-imposed requirements. Second, the additional burden is outweighed by the significant public interest benefits we believe will result. As we noted above, these requirements will discourage unqualified and abusive applicants from filing and permit early identification and possibly promote the dismissal of those who do file. This in turn will conserve the resources of the Commission and other applicants.

C. Integration

53. In 1981, we removed from Form 301 the sole question[76] that generally elicited the applicant's proposal for integrating its owners into management of the station.[77] In our current comparative process, integration is a significant and sometimes the key factor in evaluating the relative merits of the applications. Yet, applicants are often left guessing as to the details of each others' integration proposals until well into the comparative hearing.[78] Consequently, parties are unable to assess the merits of a key component of an opponent's application until late in the comparative process. This makes parties engaged in early settlement discussions more vulnerable to pressure from non *bona fide* applicants.

54. Moreover, under our current reporting requirements, we are generally not able to detect cases in which parties have filed contingent integration proposals, *i.e.*, numerous applications that are founded on full time integration of the *same owners* in the management of *numerous stations*. We have traditionally required an unequivocal promise of ownership participation to merit integration credit;[79] and accordingly, we have consistently denied integration credit for contingent integration proposals.[80] Consequently, parties relying on contingent integration proposals are entitled to no integration preference. Yet, we now provide no means early in the process for parties to discover this information.

55. To remedy this, we are amending Section IV of Form 301 to require that applicants describe their integration proposal at least by the end of the amendment-as-of-right period. Accordingly, an applicant may disclose its integration proposal when it originally files its Form 301, but it must file its integration proposal with the Commission by the amendment-as-of-right date.[81] We are permitting applicants to wait until the amendment-as-of-right date to submit their integration proposal, rather than requiring proposals in the original application, for two reasons. First, if only a single new or renewal application is filed, integration information will be unnecessary because there will be no comparative hearing. Second, we recognize, as a practical matter, that as long as an applicant can freely amend its integration proposal until the amendment-as-of-right date, it is unlikely that any applicant will put forth its best and final proposal in the initial application because this would permit other parties to file more favorable proposals.

56. If an applicant fails to disclose its integration proposal by the amendment-as-of-right date, it will receive no credit for integration in the comparative hearing.[82] To describe their integration proposals, applicants must identify each principal who will participate in the management of the proposed facility, his or her position, duties and hours, and for each principal whether a qualitative credit will be claimed for minority status, past local residence, female status, broadcast experience or civic activity. Furthermore, any claim to "daytimer" preference must be stated at the same time.[83]

57. We believe that requiring applicants to specify their integration proposals by the end of the amendment-as-of-right period will achieve significant public interest benefits. First, it will facilitate early settlement or dismissal of competing applications in comparative cases[84] involving only new applicants by permitting parties in such cases to identify the relative strengths and weaknesses in their integration proposals, including whether there are any contingencies. This in turn poten-

tially reduces the number of applicants who participate in the hearing, thereby reducing the cost of the hearing on both the participants and the Commission.

58. Second, we believe it will eliminate "integration gamesmanship" -- disclosing bogus integration proposals to throw opponents off guard, or changing the proposal as late as possible to improve one's comparative position. The reporting requirement will create a uniform cut-off date for all integration proposals. Applicants will be locked into their proposals, as a comparative matter, by the amendment-as-of-right date. Subsequent amendments to the integration proposal will only be permitted if "good cause" is shown, and any improvements to the integration proposal deriving from an amendment will not result in a comparative preference.[5] Consequently, requiring this information by the end of the amendment-as-of-right period leaves no room for wholesale "integration gamesmenship."

59. We believe these benefits outweigh the minimal burden this reporting requirement will place on most applicants. All applicants who go to a hearing on their application are required to disclose their integration proposals prior to the hearing. For these applicants, our new requirement merely shifts the timing of disclosure from the hearing to the amendment-as-of-right period, and thus creates little, if any, extra burden. We acknowledge that those applicants in cases involving competing applications for new stations who settle or dismiss their applications before the hearing stage will now be required to provide information that they would otherwise not have to provide for comparative purposes. However, this extra burden is justified precisely because of the significant role such integration information can play in prompting early settlement or dismissal of applications in such cases.

60. As with our other new reporting requirements, we do not believe that requiring applicants to file their integration proposals by the amendment-as-of-right date will increase the burden on the Commission's processing staff. This information is primarily for comparative rather than processing purposes. It is being required at the application stage to permit parties to make an early assessment of the relative merits of their applications, and thereby encourage the settlement or dismissal of applications in cases involving competing applications for new stations.

61. Our new ownership, financial and integration reporting requirements will become effective upon approval of the new reporting requirements by the Office of Management and Budget (OMB). From the effective date of the amendments until Form 301 is actually revised, applicants must provide a supplement to Form 301 containing the additional information set out herein. Applications already on file as of the effective date, however, will not be required to be amended to include the additional information.

CONCLUSION

62. We believe that our adjustments to Form 301 are aimed directly at deterring abuse of our process and are no broader than necessary to achieve this goal. The additional burdens we are placing on applicants are clearly outweighed by the significant public interest benefits we hope to gain. First, our reforms should deter or at least permit identification of financially unqualified applicants. This will prevent such applicants from exerting leverage on *bona fide* applicants to settle and will avoid the possibility that an unqualified applicant may be granted a construction permit.

63. Our reforms should also deter persons from setting up sham applicants to achieve a comparative preference or to evade Commission policies or rules. This will preserve the integrity of our application process, and ensure that the real parties-in-interest are fully and fairly compared. Moreover, our reforms will enable parties, armed with greater disclosure as to finances, real parties and integration proposals, to assess the relative merits and demerits of their applications at an early stage. This should make *bona fide* applicants less vulnerable to large settlement demands by weak or non *bona fide* applicants, and give them leverage to push non *bona fide* or weak applicants toward early settlement or dismissal. To the extent such applicants are sucessfully weeded out of our application process at an early stage, this reduces the overall cost of comparative hearings to the applicants and the Commission and facilitates the selection of the applicant who will provide service that best redounds to the public interest, convenience and necessity.

PROCEDURAL MATTERS

Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need for and purpose of the rules.

We opened this proceeding in June, 1988, with the adoption of a *Notice of Proposed Rule Making*. That *Notice* set forth portions of a proposal of the Federal Communications Bar Association (FCBA) to revise the basic broadcast station application form, FCC Form 301, to require the submission of additinal information from applicants for construction permits for broadcast stations. Specifically, the *Notice* proposed requiring the submission of additional financial, ownership, and integration information in an effort to discourage the filing of sham or abusive applications, facilitate early resolution of comparative proceedings, and expedite the processing and the adjudication of applications. After full and careful review of the comments herein, we have concluded that adopting those modifications proposed by the FCBA that were included in the *Notice* will assist in deterring and exposing applications that have been filed to exploit the comparative process. In this *Report and Order* we are making changes to three sections of Form 301. First, we are modifying Section II of the application (Legal Qualifications) to require information regarding the formation of the applicant's legal structure (if applicable), the identity of the equity owners in the applicant, and the existence of documents or understandings regarding current or future ownership rights in the applicant. We are also modifying Section III of Form 301, (Financial Qualifications) to require the applicant to estimate the cost of constructing and operating the proposed facility for three months and to provide information concerning the source of funding. In addition, we are adopting a modified version of the firm financial commitment approach in which we will return an application as unacceptable or non-tenderable if an applicant fails to certify that it is financially qualified. Finally, we are modifying Section IV of Form 301 to require that the applicant's integration statement be on file with the Commission by the amendment-as-of-right

date. We believe these modifications will fill the gaps in our reporting requirements, and thereby discourage abuse of the Commission's application process or, at least, facilitate identification of unqualified applicants.

II. Summary of issues raised by public comments in response to the initial regulatory flexibility analysis. Commission assessment and changes made as a result.

Issues Raised. Despite the specific request therefor in our *Notice*, no comments were specifically directed to the initial regulatory flexibility analysis. However, in the general comments, two matters were raised which the parties urged would affect small broadcasters. One party argued that requiring detailed ownership information would increase the amount of litigation over minor corporate issues without a concomitant reduction of sham applications. Several parties also expressed concern that requiring a "firm financial commitment" rather than a "reasonable assurance" of funding would create a barrier to entry for minorities and small businesses which could not afford the cost of commitment fees.

Assessment. The concern over increased litigation resulting from modification of our ownership information requirements was considered and addressed in our *Report and Order*, *supra* ¶ 29. We concluded that making this documentation available at the application rather than the hearing stage, when it is typically produced, would not increase the amount of litigation over the legal structure of the applicants. Regarding the standard by which we determine the financial capability of an applicant, although the *Report and Order* does adopt one aspect of the firm financial commitment approach, *i.e.*, response to the financial qualification question regarding certification is a qualifying issue, *supra* ¶ 44, it retains our current "reasonable assurance" standard for evaluating financial capability and defers consideration of the "firm financial commitment" standard for such evaluation until completion of our inquiry on this issue in the context of our comparative new licensing proceeding.

Any changes made as a result of comments. None.

III. Significant alternatives considered and rejected.

Two alternatives were considered before adopting the instant action. The first option was to retain the present Form 301. This option was rejected in light of our concern that reporting gaps in Form 301 were contributing to abuse of the Commission's application process. A second alternative considered was to adopt only some of the proposals recommended by the *Notice*. With the exception of the "firm financial commitment" standard for evaluating financial capability, we adopted all of the proposals. We believe that each type of information will play a significant role in deterring financially unqualified, sham, and abusive applications, or in providing competing applicants, and the Commission where appropriate, with the information necessary to expose such applications.

After consideration of the issues presented in the course of this proceeding, we have adopted modifications to Form 301 that we believe are reasonably structured in view of our desired goals.

The Secretary shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.*, (1981)).

PAPERWORK REDUCTION ACT STATEMENT

The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified information collection requirements on the public. Implementation of any new or modified requirements will be subject to approval of the Office of Management and Budget as prescribed by the Act.

64. Accordingly, IT IS ORDERED THAT the amendments to FCC Form 301 adopted herein as set forth in the Appendix, attached hereto, shall become effective upon approval of the new reporting requirements by the Office of Management and Budget. New applicants filing applications after the effective date of the amendments until Form 301 is revised, are required to file a supplement with the Form 301 containing the additional information requested in the Appendix.

65. IT IS FURTHER ORDERED THAT the portion of this proceeding and of BC Docket No. 81-742 related to the firm financial commitment standard is held open pending the resolution of this issue in MM Docket No. 89-15.

66. IT IS FURTHER ORDERED THAT, except as specified in ¶ 65, this proceeding IS TERMINATED, and that that portion of BC Docket No. 81-742 related to modifications to Form 301 is likewise TERMINATED.

67. Authority for the rule changes adopted herein is contained in Sections 4(i), 303(r), 308 and 309 of the Communications Act of 1934, as amended.

68. For further information regarding this proceeding, contact Marilyn Mohrman-Gillis or Doug Minster, Mass Media Bureau (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

FCC Form 301, "Application For Construction Permit For Commercial Broadcast Station," is amended as follows:

Instruction Form Modifications

Instructions for Section II - Legal Qualifications

1. Page 3. Insert new paragraph (B) as follows:

B. As used in Section II, the words "non-party equity owners in the applicant" have the following meanings:

PARTNERSHIP APPLICANT: All holders of equity interests in the applicant that are not considered parties to the application, including all limited partners. In the event there are more than fifty (50) owners of equity interests in the applicant, only those who own 5% or more of the total equity in the applicant are considered non-party equity owners for purposes of Section II.

CORPORATE APPLICANT: All holders of equity interests in the applicant that are not considered parties to the application, including all nonvoting stockholders, stockholders with less than 5% voting stock interest and stockholders with less than a majority interest in voting stock where a single entity owns more than 50% of the voting stock. In the event that there are more than fifty (50) stockholders or owners of equity interests in the applicant, only those who own 5% or more of the total equity in the applicant are considered non-party equity owners for purposes of Section II.

ANY OTHER APPLICANT: All holders of equity interests in the applicant that are not considered parties to the application.

2. Page 3. The first full paragraph following "Any Other Applicant" is redesignated as paragraph (C) and replaced with the following:

An attributable interest is an ownership interest in or relation to an applicant or licensee which will confer on its holder that degree of influence or control over the applicant or licensee as should subject it to limitation by the Commission's multiple ownership rules. Parties to the application are holders of attributable interests. Non-party holders of equity interests in the applicant are holders of nonattributable interests. While these holders of nonattributable interests are not considered parties to the application, Section II information must be provided for them. Moreover, they may have attributable interests in other media that are considered under the Commission's cross-interest policy which seeks to ensure the promotion and maintenance of arms' length competition between stations in the same area. For example, a limited partner in an applicant, which has made the above partnership certification, may have an attributable interest in a newspaper or broadcast station in the same area, or in a station with contours that overlap the applicant's proposed station, or in a cable television (CATV) system that is located within the Grade B contour of a proposed television station. *See, generally,* 73.3555 and 76.501 of the Commission's Rules as to the relevant contours. If so, the applicant is required:

(1) to identify the individuals or entities that have an attributable interest in another medium of mass communications in the area;

(2) to state the nature and extent of the interest in the applicant; and

(3) to identify the other medium and the nature and extent of the interest held.

In situations in which a marital relationship is involved, the interests held by one spouse are presumptively attributed to the other and both spouses may, unless this presumption is rebutted by an appropriate showing, be considered to be holders of attributable interests and parties to this application.

Instructions for Section III - Financial Qualifications

1. Paragraph (D) is redesignated paragraph (E) and new paragraph (D) is added to read as follows:

D. (1)(a) The applicant must estimate the initial costs of constructing and operating the facility proposed in the application. The estimate for constructing the facility should include, but is not limited to, costs incurred for items listed below. In calculating costs for the items below, determine the costs for the items in place and ready for service, including amounts for labor, supervision, materials, supplies, and freight:

Antenna System (including antenna, antenna tower, transmission line, phasing equipment, ground system, coupling equipment and tower lighting);

RF Generating Equipment (including transmitter, tubes, filters, diplexer, remote control equipment, and automatic logger);

Monitoring and Test Equipment (including frequency monitor, modulation monitor, oscilliscope, dummy load, vectorscope, and video monitors);

Program Origination Equipment (including control consoles, film chains, cameras, audio tape equipment, video tape equipment, program and distribution amplifiers, limiters, and transcription equipment);

Acquiring Land;

Acquiring, Remodeling or Constructing Buildings;

Services (including legal, engineering, and installation costs); and

Other miscellaneous items (including mobile and STL equipment, non-technical studio furnishings, etc.)

(b) The estimate must also include the costs of operating the proposed facility for the first three months, including the costs of proposed programming, without relying on advertising or other revenues to meet operating costs. To arrive at an estimate of the total costs to be met by the applicant, the total construction costs should be added to the estimated cost of operation for three months.

(2) The applicant must also identify, in the application, its sources of funding for the construction and operation of the proposed facility for the first three months. For each source of funding, the applicant must identify the source's name, address, telephone number, a contact person if the source is an entity, the relationship (if any) of the source to the applicant, and the amount of funds to be supplied by the source. The total amount of funds to be supplied by all the sources listed should equal or exceed the estimated cost of construction and

operation computed in accordance with paragraph (1) and stated in the application in response to Question 1(b), Section III.

The funding sources listed on the application should include, if applicable: existing capital, new capital, loans from banks (identified separately), loans from others (identified separately), profits from existing operations, donations, and net deferred credit from equipment suppliers (identified separately and determined by deducting from the deferred credit the down payment, payments to principal, and interest payments). (Note: if the first equipment payment is due upon shipment, the applicant must include 5 monthly payments; if due in 30 days, four monthly payments; if due in 60 days, 3 monthly payments, etc.)

(3) The applicant must also have on hand, at the time it files its application, BUT NEED NOT SUBMIT WITH THE APPLICATION, the following documentation:

(a) For the applicant:

A detailed balance sheet at the close of a month within 90 days of the date of the application showing the applicant's financial position.

A statement showing the yearly net income, after Federal income tax, for each of the past two years, received by the applicant from any source.

(b) For each person identified in response to Question 1(c), Section III who has *already* furnished funds, purchased stock, extended credit, or guaranteed loans:

A copy of the agreement obligating the party to furnish funds, showing the amount furnished, the rate of interest, the terms of repayment, and security, if any.

(c) For each person identified in response to Question 1(c), Section III who has *agreed to* furnish funds, purchase stock, extend credit, or guarantee loans, a balance sheet or a financial statement showing:

All liabilities and current and liquid assets sufficient to meet current liabilities;

Financial ability to comply with the terms of the agreement to furnish funds, purchase stock, extend credit, or guarantee loans; and

Net income after Federal income tax, received for the past two years.

Note: If the statement does not indicate current and liquid assets sufficient to meet the proposed commitments, the financial statement must be supplemented by a statement showing how non-liquid assets will be used to provide the funds, and the extent to which such assets have liens or prior obligations against them.

(d) For financial institutions or equipment manufacturers, identified in response to Question 1(c), Section III, who have agreed to make a loan or extend credit:

The document by which the institution or manufacturer has agreed to provide the loan or credit, showing the amount of loan or credit, terms of payment or repayment of the loan, collateral or security required, rate of interest to be charged, any special requirements (*e.g.*, moratorium on principal or interest, waiver of collateral, etc.); and

A statement from any parties required to provide special endorsements showing their willingness to provide such endorsements.

Instructions for Section IV - Program Service Statement

1. Instructions for Section IV - Program Service Statement is amended by redesignating Section IV as Section IV-A and adding Instructions for new Section IV-B - "Integration Statement" to read as follows:

The applicant's integration statement must identify each principal who will participate in the management of the station, his or her position, duties and hours, and for each principal whether a qualitative credit will be claimed for minority status, past local residence, female status, broadcast experience or civic activity. Any claim for "daytimer" preference must also be stated. An applicant may include its integration statement in this application, but it must file its integration statement with the Commission by the amendment-as- of-right date in FM proceedings, or the "B" cut-off date in AM and television proceedings. If an applicant fails to disclose its integration statement by the amendment-as-of-right or "B" cut-off date, whichever is applicable, it will receive no credit for integration in the comparative hearing.

Application Form Modifications

Section II - Legal Qualifications

1. Page 2, paragraph 2, NOTE is amended to read as follows:

NOTE: The terms "applicant," "parties to this application," and "non-party equity owners in the applicant" are defined in the instructions for Section II of this form. Complete information as to *each* "party to this application" and each "non-party equity owner in the applicant" is required. If the applicant considers that to furnish complete information would pose an unreasonable burden, it may request that the Commission waive the strict terms of this requirement with appropriate justification.

2. Page 2, paragraphs 3-10 are redesignated as paragraph 5-12 and new paragraphs 3 and 4 are added. New Paragraph 3 reads as follows:

If the applicant is not an individual, provide the date and place of filing of the applicant's enabling charter (*e.g.*, a limited partnership must identify its certificate of limited partnership and a corporation

must identify its articles of incorporation by date and place of filing):

Date _____ Place _____

In the event there is no requirement that the enabling charter be filed with the state, the applicant shall include the enabling charter in the applicant's public inspection file.

3. New paragraph 4 reads as follows:

Are there any documents, instruments, contracts or understandings (written or oral), other than instruments identified in response to paragraph 3, Section II of Form 301, relating to future ownership interests in the applicant, including but not limited to, insulated limited partnership shares, nonvoting stock interests, beneficial stock ownership interests, options, rights of first refusal, or debentures?

Yes _____ No _____

If "Yes," submit all such written documents, instruments, contracts, or understandings, and provide the particulars of any oral agreement in Exhibit No._____.

4. The introductory paragraph to Section II, new Paragraph 6 on Page 3 is revised to read as follows:

List the applicant, parties to the application and non-party equity owners in the applicant. Use one column for each individual or entity. Attach additional pages if necessary.

5. The first line in Section II, new paragraph 7, Page 3 is revised to read as follows:

Does the applicant, any party to the application or any non-party equity owner in the applicant have, or have they had, any interest in:

6. The question in Section II, new paragraph 8(a) is revised to read as follows:

Are any of the parties to the application or non-party equity owners in the applicant related (as husband, wife, father, mother, brother, sister, son or daughter) to each other.

Yes _____ No _____

7. The question in Section II, new paragraph 8(b) is revised to read as follows:

Does any member of the immediate family (i.e., husband, wife, father, mother, brother, sister, son or daughter) of *any party* to the application or of any non-party equity owner in the applicant have any interest in or connection with any other broadcast station, pending broadcast application, newspaper in the same area (*see* Section 73.3555(c)) or, in the case of a television station applicant only, a cable television system in the same area (see Section 76.501(a))?

8. New paragraph 12 (a), Section II is revised to read as follows:

Has an adverse finding been made or an adverse final action taken by any court or administrative body as to the applicant, any party to this application, or any non-party equity owner in the applicant in a civil or criminal proceeding brought under the provisions of any law related to the following:

Section III - Financial Qualifications

1. Section III is amended by redesignating the existing paragraph as paragraph (a) and adding new paragraphs (b) and (c) to read as follows:

* * *

(b) State the total funds you estimate are necessary to construct and operate the requested facility for three months without revenue: $_____.

(c) Identify each source of funds, including the name, address, and telephone number of the source (and a contact person if the source is an entity), the relationship (if any) of the source to the applicant, and the amount of funds to be supplied by each source.

Section IV - Program Service Statement

1. Section IV is amended by redesignating the existing section as Section IV-A and adding new Section IV-B - "Integration Statement" to read as follows:

a. List each principal of the applicant who, in the event of a grant of the application on a comparative basis proposes to participate in the management of the proposed facility and, with respect to each such principal, state whether he or she will work full-time (minimum 40 hours per week) or part-time (minimum 20 hours per week) and briefly describe the proposed position and duties.

b. State with respect to each principal identified in response to Item 1 above, whether the applicant will claim qualitative credit for any of the following enhancement factors:

Yes No

(a) Minority Status

(b) Past Local Residence
If yes, specify whether
in the community of
license or service area
and the corresponding
dates:

(c) Female Status

(d) Broadcast Experience
If yes, list each
employer and position
and corresponding dates:

(e) Daytime Preference

FOOTNOTES

[1] Also addressed herein are related matters raised in Docket No. 81-742. *See* ¶ 5 *infra*.

[2] *Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 3 FCC Rcd 4112 (1988).

[3] *See* ¶¶ 5, 6 & 14 *infra*.

[4] We are currently seeking comment on a proposal to use random selection (lottery) procedures under Section 309(i) of the Communications Act, instead of our current comparative process, to award licenses for new broadcast facilities. *See Notice of Proposed Rule Making* in MM Docket No. 89-15, 4 FCC Rcd 2256 (adopted January 30, 1989). If we should adopt a lottery procedure, it would necessitate additional modification of FCC Form 301. However, we believe it is advisable to cure the defects we have identified in Form 301 now, without waiting for that proceeding to be concluded. The changes adopted herein are broadly consistent with the direction contained in the lottery proposal.

[5] Where a single application (either for a new station or a renewal application for an existing facility) is filed, the Commission staff determines whether the application can properly be granted. Where two or more acceptable applications for a construction permit are mutually exclusive, a joint comparative hearing is held. During the hearing, an Administrative Law Judge (ALJ) makes findings as to the applicant who will best serve the public interest, convenience and necessity based on certain criteria, including ownership diversity, integration of ownership and management (with possible enhancements for local residence, broadcasting experience, and female or minority participation) and efficient use of the frequency.

[6] FCC Form 301 is also used to make changes in existing facilities. The amendments proposed by the FCBA and adopted herein do not apply to those sections of Form 301 that must be completed by an applicant for authority to make changes in existing facilities.

[7] *Revision of Form 301*, 50 RR 2d 381 (1981).

[8] *Id.* at 381.

[9] *See* FCC Form 301, Sec. III at 6.

[10] *See infra* note 76 and accompanying text.

[11] In modifying our ownership attribution standards, we provided that certain noncontroiling interests would not be considered "attributable" owners of broadcast interests for the purposes of applying our multiple ownership rules. *See Attribution of Ownership Interests*, 55 RR 2d 1465, 1488 (1984), *reconsidered*, 58 RR 2d 604 (1985), *further clarified*, 1 FCC Rcd 802 (1986) (*Attribution Report*).

[12] In addition to the proposed changes addressed in this *Report and Order*, the FCBA requested three other procedural modifications to Form 301. The FCBA recommended that the Commission: 1) review financial showings on a random basis; 2) establish a single cut-off date for the filing of all amendments without exception; and 3) promulgate interim procedures to implement the proposed recommendations pending modification of Form 301. We declined to consider these suggestions for various reasons. Accordingly, we excluded these issues from the scope of this proceeding. *See Notice* at ¶¶ 6-9.

[13] *See Second Further Notice of Proposed Rule Making* in BC Docket No. 81-742, 3 FCC Rcd 5179 (1988) (*Comparative Renewal Notice*). Similar to the proposals here, we invited comment on options that might be available for testing the *bona fides* of applicants to enable us to separate sincere applicants from those simply seeking to prey on the inadequacies of the regulatory process for private gain. *Id.* at ¶¶ 25-26. These included strengthening existing filing requirements by, *inter alia*, requiring a renewal challenger to file documentation and information supporting its financial qualifications at the time the application is filed. Our intent in requesting comment in *Comparative Renewal*, as well as in this proceeding, was not merely to discourage filings by non *bona fide* applicants but, for those that still did file, to enable us to expose these applicants at the application stage and, if they were found defective under our new filing standards, to dismiss them.

[14] *See* Comments of Booth, Freret, and Imlay (Booth); CBS, Inc.; Stanley Emert, Jr. (Emert); the National Association of Broadcasting (NAB), and Virden Broadcasting Corp. (Virden).

[15] *See* Comments of Action for Children's Television and the Office of Communication of the United Church of Christ (ACT/UCC) (supporting the requirement that all equity owners in the applicant be identified) and du Treil, Lundin and Rackley (du Treil) (supporting the requirement that source and amount of funds be identified).

[16] *See* Comments of Ronald Balonis (Balonis). Balonis objected to the Commission's revising Form 301 for the purpose of facilitating settlement agreements among competing applicants. In his opinion, encouraging such settlements will not necessarily lead to licensing of the "best applicants" but rather the ones with the most money or the greatest skill at coercing other applicants. This latter issue, however, is a matter that goes beyond the scope of this proceeding.

[17] *See infra* ¶ 12.

[18] *See supra* note 14.

[19] *See* Comments of Skidelsky at 5; *Notice* at ¶ 2.

[20] *See* Comments of ACT/UCC, Booth, CBS, Emert, FCBA, NAB, Skidelsky and Virden.

[21] *See* Comments of FCBA at 11 (arguing a return to cutoffs similar to those existing before the 1981 Form 301 amendments would provide sufficient information to investigate an applicant's structure), CBS at 7 (cutoff is less burdensome than requiring disclosure of all stockholders in a widely held entity). ACT/UCC, noting that it is important to know the identity and basic qualifications of all equity holders, would require identification of all equity owners with 1% or more of the stock or partnership equity. *See* Comments of ACT/UCC at 9. Skidelsky

would limit disclosure to the twenty largest interests noting that this would parallel bankruptcy practice. *See* Comments of Skidelsky at 4.

[22] *See* Comments of Booth, CBS, Emert, FCBA, NAB and Virden.

[23] *See* Comments of FCBA at 13.

[24] *See* Comments of Booth, CBS, Emert, FCBA, NAB, du Treil, and Virden.

[25] *See* Comments of Skidelsky at 2.

[26] *See infra* note 71.

[27] *See* Comments of CBS, FCBA, Skidelsky and du Treil.

[28] *See* Comments of NAB at 8.

[29] *See* Comments of Booth at 3-4.

[30] *See* Comments of Skidelsky at 3.

[31] *See* Comments of American Women in Radio and Television (AWRT); Capital Broadcasting Corporation *et. al.* (CBC *et. al.*); CBS, Inc.; Cox Enterprises, Inc. and Diversified Communications (Cox); Great American Television and Radio Company, Inc. (Great American); Leibowitz & Spencer, *et. al.*; Midwest Television, Inc. and The Providence Journal Company (Midwest); NAB; Peper, Martin, Jensen, Maichel and Hetlage (Peper Martin); Post-Newsweek Stations, Inc. (Post-Newsweek); Television Operators Caucus, Inc. (TOC); United States Catholic Conference (USCC); Westinghouse Broadcasting Company, Inc. (Group W). *See* Reply Comments of Capital Cities/ABC Inc.

[32] *See* Comments of AWRT (would require ownership, but not financial information); and Midwest (would require financial information).

[33] *See Attribution Report*, *supra* note 11.

[34] *Id.* at 1488, n. 69.

[35] Individuals or entities holding nonattributable interests in the applicant must be identified if they have attributable interests in other media outlets that are currently considered under the Commission's cross-interest policy. *See* FCC Form 301, Instructions for Section II, p. 3.

[36] *See* FCC Form 301, Section II, Question 3(a) and Instructions for Section II, p. 2.

[37] *Attribution Report*, 55 RR 2d at 1489.

[38] 99 FCC 2d 173 (Rev. Bd. 1984), *modified* 58 RR 2d 1483 (1985).

[39] *See e.g. Henderson Broadcasting Co., Inc.*, 63 FCC 2d 419, 426 (Rev. Bd. 1977) (Board refused a 100% integration credit after concluding that the majority shareholder, who would be integrated into management, did not have actual control); *Capital City Community Interests, Inc.*, 2 FCC Rcd 1984 (Rev. Bd. 1987) (applicant was controlled by nonvoting shareholders seeking integration credit based on minority status of a "front" voting shareholder); *N. E. O. Broadcasting Co.*, 103 FCC 2d 1031 (Rev. Bd. 1986), *review denied*, 1 FCC Rcd 380 (1986) (integration credit denied because corporate structure was constructed to take advantage of the Commission's comparative preferences).

[40] 102 FCC 2d 1293 (Rev. Bd. 1985).

[41] The limited partner contributed 85% of the equity, petitioned the Commission in his own name to have the channel allocated, hired the consulting firm which prepared the application, signed the contracts for equipment and preparation of the application, hired legal counsel, obtained the transmitter site, advised the general partner on all application decisions (which advice was followed in every instance), prepared the financial plan, entered into a bank agreement to provide the financing, and represented the partnership in negotiations with other applicants. *See also Berryville Broadcasting Co.*, 70 FCC 2d 1 (Rev. Bd. 1978) (although integrated general partners claimed an integration credit was warranted, all financing was provided by the third partner; thus, true and actual control rested with that partner); *Payne Communications Inc.*, 1 FCC Rcd 1052, 1058, 1060 (Rev. Bd. 1986) (integration credit denied where limited partner, *inter alia*, employed a research agency to find general partners with favorable qualitative enhancements for his application); *Pacific Television, Ltd.*, 2 FCC Rcd 1101 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1700 (1988) (limited partner provided 99% of the financing and paid for legal counsel who prepared the application and retained engineering consultant); *Religious Broadcasting Network*, 3 FCC Rcd 4085, 4097-98 (Rev. Bd. 1988), *reconsideration granted on other grounds*, 3 FCC Rcd 6216 (Rev. Bd. 1988) (general partners materialized shortly before the application was filed, limited partner held a 90% ownership interest and provided every major element of the application including financing, attorneys and its engineer).

[42] We are currently investigating allegations that applicants have engaged in this type of activity in order to avoid disqualification for violating our rules. One individual involved had previously been found unqualified to be a Commission licensee. It is alleged, however, that he has filed multiple applications in various communities using fictitious applicants and disinterested parties. *See Inquiry into Alleged Abuses of the Commission's Processes*, 3 FCC Rcd 4740 (1988) (*Abuse Inquiry*). *Cf. Bellingham Television Association, Ltd.*, 103 FCC 2d 222 (Rev. Bd. 1986) (investigation of alleged existence of an undisclosed principal in an application revealed that the applicant used a limited partnership in an effort to avoid a diversification demerit and to gain an integration credit). *Religious Broadcasting Network*, *supra* note 41 at 4090 ("Limited partner" held interests in multiple permits which precluded him from prevailing in his own right due to the closeness of the comparative contest).

[43] *See* Comments of NAB in BC Docket No. 81-742 at 29. *See Abuse Inquiry*, 3 FCC Rcd at 4740 (inquiry into whether multiple applications, apparently backed by a single person and using fictitious persons as principals, were filed for the purpose of reaching settlements rather than obtaining a license).

[44] For example, a partnership applicant must identify all partners, except insulated limited partners, as parties. A corporate applicant must identify all officers and directors and 5% or more shareholders as parties. *See* FCC Form 301, Instructions for Section II at 2.

[45] An individual applicant is defined as the natural person applying for the facilities in his or her own right, *See* FCC Form 301, Instructions for Section II A at 2.

[46] *See Notice* at ¶ 2. Commenter Skidelsky reiterated this concern. *See* Comments of Skidelsky at 5.

[47] Debt relationships will be disclosed in the amended Financial Qualifications section of Form 301. *See* ¶ 42 *infra*. This will permit investigation of these relationships to determine whether a real party-in-interest issue exists in connection with such a relationship.

[48] This disclosure requirement will be implemented by amending the definitions contained in the Instructions for Section II. The specific amendments are set out in the Appendix attached hereto.

[49] *See Corporate Ownership Reporting and Disclosure*, 59 FCC 2d 905 (1976); *Multiple Ownership and Cross Ownership*, 59 FCC 2d 970 (1976). Although the context of our decision is different in this instance, our rationale of reducing the burden on widely held entities is still applicable.

[50] *See Attribution Report*, *supra* note 11.

[51] *See Daytona Broadcasting Co.*, 103 FCC 2d 931, 934-35 (1986).

[52] *See Attribution Report*, 55 RR 2d at 1469.

[53] *See Daytona Broadcasting Co.*, 103 FCC 2d at 934-35.

[54] Reporting requirements in the Ownership Report, FCC Form 323, remain unchanged.

[55] We eliminated a question seeking this information in 1986 to further conform our reporting requirements with our attribution rules.

[56] *See Payne Communications*, *supra* note 41 at 1057 (sole proprietor claimed 100% integration; discounted where option existed which would require sole proprietor to incorporate and relinquish 49% of her proprietary interest to a new entity). We do not regard agreements relating to future ownership rights as *per se* contrary to the public interest unless they are used to evade Commission review. However, this does not mean that we will necessarily approve all such agreements.

[57] For example, the staff will continue its procedure of accepting an applicant's assertion that a reported limited partnership interest is properly insulated for purposes of the Commission's multiple ownership rules.

[58] We emphasize that we do not here alter our longstanding practice of barring pre-designation pleadings by applicants concerning the qualifications, whether ownership related or not, of their competitors. *See Revised Procedures for the Processing of Contested Broadcast Applications*, 72 FCC 2d 202, 214 (1979).

[59] *See Revision of Form 301*, 50 RR 2d at 382.

[60] *See* Form 301 Sec. III.

[61] *See Revision of Form 301*, *supra* note 59.

[62] *Id.*

[63] *Certification of Financial Qualifications*, 62 RR 2d 638, 639 (1987).

[64] *Id.* at 639.

[65] *See, e.g., Melvin Jones*, 2 FCC Rcd 5581 (MM Bureau 1987); *Columbus Broadcasting Corp.*, 3 FCC Rcd 5480 (MM Bureau 1988); *Palmetto Broadcasting, Inc.*, 3 FCC Rcd 3928 (MM Bureau 1988).

[66] *See, e.g., Washoe Shoshone Broadcasting*, 64 RR 2d 1748 (Rev. Bd. 1988); *Newton Television Ltd.*, 64 RR 2d 701, 704 n.3 (Rev. Bd. 1988); *Tulsa Broadcasting Group*, 64 RR 2d 457 (Rev. Bd. 1987).

[67] FCC Form 301, Section III at 6.

[68] *See* attached Appendix. Pursuant to these instructions, documentation that establishes an applicant's financial qualifications includes, among other things, a balance sheet of the applicant; net income statements for the past two years; itemization of all applicant's deposits; financial statements for all persons who agreed to furnish funds, purchase stock, extend credit or guarantee loans; and for all bank loans, documentation from the financial institution indicating the institution's willingness to provide such loans, and showing the specific amount, the terms of repayment and the interest rate.

[69] *Amendment of the Commission's Rules for Rural Cellular Service*, 64 RR 2d 1391, 1395 (1988).

[70] *See* 47 C.F.R. § 73.3564.

[71] This constitutes a change in our current interpretation of 47 C.F.R. § 73.3564. Generally, prior to this *Report*, only applications for commercial FM stations where the financial certification was left blank were returned as non-tenderable. *See Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19932 (1985). Where the financial certification question was left blank in applications for the remaining services (noncommercial FM, AM and TV), and where the financial certification box was checked "No" in applications for all services (commercial and noncommercial FM, AM and TV), an issue was designated against the mutually exclusive applicant for resolution in the hearing, and a deficiency letter was issued against a single applicant which, if not cured, made the application ungrantable. *See Public Notice*, 49 Fed. Reg. 47331, 56 RR 2d 776 (1984) (AM and noncommercial FM) and *Gali Communications, Inc.*, MM Docket No. 86-180, released May 27, 1986; *Vela Broadcasting Co.*, MM Docket No. 88-132, released May 20, 1985 (Hearing Designation Order); *Citylight Communications, Inc.*, DA 89-166, released February 10, 1989.

[72] *See supra* note 4.

[73] As we stated in the context of ownership information, the absence of an issue in the hearing designation order should not be construed by the Administrative Law Judge as a ruling on the acceptability of the financial information provided. *See* ¶ 38 *supra*. In the event, of course, that there are no competing applicants, the processing staff will resolve the matter by requesting appropriate amendments to applications with deficiencies that would bar their grant.

[74] *See, e.g., Policy Regarding Character Qualifications In Broadcast Licensing*, 102 FCC 2d 1179 (1986), *recon. denied*, 1 FCC Rcd 421 (1986); *United Broadcasting Co.*, 86 FCC 2d 452 (1981).

[75] *See* Form 301, Instructions for Section III, p. 4.

[76] Prior to our 1981 amendments, question 27 of Section IV of Form 301 requested information concerning the person responsible for implementing the applicant's programming proposal. Some applicants provided a complete integration statement in response to this question.

[77] In an integration proposal, an applicant identifies each principal who will participate in the management of the proposed facility, to what extent the principal will participate, and whether a qualitative credit will be claimed for minority status, past local residence, female status, broadcast experience or civic activity.

[78] In practice, integration information is frequently not disclosed until the discovery stage of a comparative hearing.

[79] *See Berryville Broadcasting Co.*, 70 FCC 2d 1 (Rev. Bd. 1978).

[80] *See High Sierra Broadcasting, Inc.*, 96 FCC 2d 423 (Rev. Bd 1983), *reh. den.*, 56 RR 2d 1394 (1984); *Northern Sun Corp.*, MM Docket No. 83-1050, FCC 85R-42 (rel. May 9, 1985) (Rev. Bd.).

[81] The FM amendment-as-of-right date, which is equivalent to the "B" cut-off date in television and AM proceedings, is set by our window filing procedure in this service. FM applications found acceptable for tender are placed on a publicly released Notice of Tenderability. From the release of the Notice, applicants have thirty days to amend or perfect their applications as a matter of right. Under the cut-off procedure used in the AM and TV services, when an application is accepted for filing it is placed on an "A" cut-off public notice which provides a thirty-day period for the filing of applications that are mutually exclusive with, and petitions to deny, the lead application. During this period, the lead applicant is allowed to make amendments as of right. After any such competing applications are filed, they are placed on a "B" cut-off notice which provides for a thirty-day period for the filing of petitions to deny against those applicants on the "B" list and for filing of minor amendments as of right by the "A" and "B" applicants.

[82] This changes our current policy. Generally, Commission policy prohibits applicants from amending their applications to improve their comparative positions after the amendment-as-of-right, or "B" cut-off date. Form 301, however, has never explicitly required applicants to set forth their full integration proposals in their applications, until now. Thus, applicants have typically waited until the exchange of exhibits prior to hearing before revealing their complete integration proposals for the

first time. In *Northland Communications*, 100 FCC 2d 914, 917 (1985) (Rev. Bd.) *reh. den.*, 60 RR 2d 776 (1986), the Review Board stated that it would not consider a change in an integration proposal as violative of our general prohibition against upgrading a proposal after the "B" cut-off date where an applicant's integration proposal was final on the exhibits exchange date or earlier if specified by the ALJ, particularly because current Form 301 does not include questions under which an applicant's proposal could be set forth.

[83] *See* the Appendix for the specific questions.

[84] *See Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Report and Order* in BC Docket No. 81-742, FCC 89-108, _____ FCC Rcd _____ , (adopted March 30, 1989). (Commission adopts policy prohibiting all payments to competing applicants, other than an incumbent licensee, for the withdrawal of an application prior to the Initial Decision stage of a comparative hearing.

[85] *Women's Broadcasting Coalition, Inc.*, 59 RR 2d 730, 733 (1986). *See also Martin Intermark, Inc.*, 64 RR 2d 1125, 1127 (Rev. Bd. 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-44

In the Matter of

Procedure for measuring
electromagnetic emissions from
digital devices.

ORDER EXTENDING TIME TO FILE COMMENTS

Adopted: April 10, 1989; Released: April 26, 1989

By the Chief Engineer:

1. A Notice of Proposed Rule Making in the above entitled proceeding, FCC 89-53, was adopted by the Commission on February 13, 1989, and released on March 7, 1989. Comments in this proceeding are due on May 8, 1989. Reply comments are due June 7, 1989.

2. Since the release of this item, American Telephone and Telegraph Company (AT&T) and the Computer and Business Equipment Manufacturers Association (CBEMA) have filed with the Commission petitions requesting extensions of the time for filing comments and reply comments. The petitioners express basically the same opinion. Additional time is needed because the proposed changes to the digital device measurement procedure are extensive and require actual testing to determine the impact these changes will have on the test results of digital devices. These results must then be coordinated and analyzed before meaningful replies can be submitted.

3. Because of the coordination and analysis of test results which must be accomplished, as well as our desire to have a fully developed record before us, it has been determined that an extension of the comment and reply comment dates is appropriate. However, due to our desire to finish this proceeding as soon as possible, it is believed that the concerns of the petitioners can be resolved by extending the comment date by 30 days, instead of the 60 days requested. The reply comment date will likewise be extended by 30 days. Accordingly, IT IS ORDERED, pursuant to the delegated authority contained in 47 CFR 0.241(a)(5), that the period of time for the filing of comments in the above proceeding is extended until **June 7, 1989,** and the period of time for filing of reply comments is extended until **July 7, 1989.**

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-420

In the Matter of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. File No. BPET-811118KF

Permittee of Noncommercial Educational Television Station KEEF-TV, Los Angeles, California

Order to Show Cause Why the Permit of KEEF-TV should not be revoked and Notice of Apparent Liability for a Forfeiture

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC., File NO. BLET-870225KE

Permittee of KEEF-TV, Los Angeles, California

For License to Cover Construction Permit

In re Application of File No. BMPCT-870610KU

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC.
Permittee of KEEF-TV, Los Angeles, California

For Consent to Modify Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC., File No. BLET-870610KT
Permittee of KEEF-TV, Los Angeles, California

For License to Cover Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC.,
Permittee of KEEF-TV, Los Angeles, California

For Special Temporary Authority

MEMORANDUM OPINION AND ORDER

Adopted: April 19, 1989; Released: April 28, 1989

By the Commission:

1. Before the Commission are: (1) a Motion for Leave to File Petition for Reconsideration and Petition for Stay filed October 13, 1988 by Black Television Workshop of Los Angeles, Inc. (BTW); (2) a Petition for Reconsideration and Petition for Stay filed October 13, 1988 by BTW; (3) an opposition to the petition for reconsideration filed October 27, 1988 by the Mass Media Bureau; (4) a Reply to Opposition of Mass Media Bureau filed November 7, 1988 by BTW; (5) a Motion for Leave to Re-file Petition for Stay filed November 7, 1988 by BTW; (6) a Petition for Stay filed November 7, 1988 by BTW; (7) an Application for Review of Bill of Particulars filed November 14, 1988 by BTW; (8) an opposition to the petition for stay filed November 17, 1988 by the Mass Media Bureau; and (9) an opposition to application for review of bill of particulars filed November 29, 1988 by the Mass Media Bureau. The petition for stay portion of BTW's original pleading was dismissed by *Order*, FCC 88I-103 (Oct. 19, 1988) but the refiled petition for stay is before us. All of the pleadings relate to the Commission's release on September 12, 1988 of an Order to Show Cause, Hearing Designation Order and Notice of Apparent Liability, 3 FCC Rcd 5443 (1988).[1]

I. BACKGROUND

2. On April 15, 1983, Black Television Workshop of Los Angeles, Inc. (BTW) obtained a permit to construct a noncommercial UHF television station on reserved Channel 68 to serve the Los Angeles area. After BTW had begun broadcasting pursuant to requested program test authority, the Commission conducted a preliminary investigation into various allegations of wrongdoing, and, on August 8, 1987, the Mass Media Bureau ordered the station off the air for unauthorized construction. On September 12, 1988, the Commission issued an Order to

Show Cause, Hearing Designation Order and Notice of Apparent Liability (HDO) against BTW. 3 FCC Rcd 5443 (1988). The major issues relate to the claims of two groups of BTW directors, one led by Mary Woodfork, the other by Booker T. Wade, Jr., each claiming the right to control the permittee.

3. Specifically, the Commission seeks to determine: (1) whether there was an unauthorized transfer of control of the permittee (BTW); (2) whether BTW made misrepresentations to, was lacking in candor in its dealings with, or attempted to mislead or deceive the Commission as to the true ownership and control of the permittee in BTW's original permit application, subsequent applications, in ownership reports, and in pleadings filed with the Commission with respect to the past and current control of BTW; and (3) whether BTW violated 47 C.F.R. § 73.3613(b), by failing to file its articles of incorporation, bylaws, and any agreements or understandings affecting ownership and control of BTW.

II. PETITION FOR RECONSIDERATION

4. BTW, as represented by its current Board of Directors -- Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope S. Smith -- asks the Commission to reconsider its Order to Show Cause, Hearing Designation Order, and Notice of Apparent Liability released on September 12, 1988 in this proceeding. The Commission's Rules provide that petitions for reconsideration of a hearing designation order will be entertained only as to an adverse ruling with respect to petitioner's participation in the proceeding. 47 C.F.R. § 1.106(a)(1). "Petitions for reconsideration of other interlocutory actions will not be entertained." *Id.* BTW admits that its petition would not normally be allowed, but submits that in *Storz Broadcasting Company*, 51 FCC 2d 575 (1975), the Commission held that it would consider such petitions for reconsideration where questions were raised as to the substantiality of the allegations presented in the designation order and where questions were raised as to whether a hearing is even warranted.

5. BTW's interpretation of the holding in *Storz Broadcasting* is wrong. Were it not, a petition for reconsideration would lie against virtually every hearing designation order. In *Storz Broadcasting Company*, the renewal application of WTIX, New Orleans, Louisiana, was designated for hearing. Storz filed a motion and petition for reconsideration based, in part, on the fact that Storz had not been served with petitioner's reply to Storz' opposition. Because the Commission based its hearing designation order on information contained only in the reply to which Storz had no opportunity to respond, it granted the petition for reconsideration. *Storz Broadcasting Company*, 51 FCC 2d at 575 ¶ 2. Even so, the Commission did not terminate the hearing but merely directed the Chief Administrative Law Judge to conduct an inquiry to determine whether a substantial basis for a hearing existed. *Id.* at 576 ¶ 5. Because BTW had a full opportunity to respond to all of the complaints and allegations against it, BTW's reliance on *Storz Broadcasting* is misplaced.

6. BTW also argues that 47 C.F.R. § 1.89 requires that *before* revocation proceedings are instituted, a permittee must be served with a written notice by the Commission of any alleged violations and then be given the opportunity to submit a statement concerning the allegations. *Motion for Leave to File Petition for Reconsideration and Petition for Stay* at 14. The Bureau submits that a letter dated June 9, 1988 was sent to BTW in response to its request pursuant to 47 C.F.R. § 1.88 that it be given an opportunity to submit a statement addressing the matters presently under investigation by the Bureau. *Mass Media Bureau's Opposition* at 3. The letter indicated that BTW had received all of the pleadings filed on behalf of the Woodfork group and had already provided responses to the allegations therein. *Id.* at Attachment 1. The letter also advised BTW that pursuant to Section 1.88, it could submit whatever additional information relevant to those allegations that it chose. *Id.*

7. BTW argues that compliance with Section 1.88 does not constitute compliance with Section 1.89. *Reply to Opposition of Mass Media Bureau*, at 3. BTW submits that Section 1.88 requires only notification as to the *general* nature of an ongoing investigation, while Section 1.89 requires notice of the *specific facts* which form the basis for any alleged violations of the rules. *Id.*

8. BTW has failed to support its claim that its procedural or due process rights have been violated. The notice given by the Bureau, together with the prehearing pleadings filed by the Woodfork group, more than adequately inform BTW of the specific facts upon which the alleged violations are based. Moreover, we find Section 1.89 to be inapplicable because an issue of misrepresentation and lack of candor or intent to deceive has been designated against BTW. Such acts are "act[s] of willfulness" specifically exempted from the notice requirements of Section 1.89. In light of the above, BTW has not demonstrated any reason why the Commission should depart from its standard practice of refusing to entertain petitions for reconsideration of a hearing designation order.

III. SPECIAL TEMPORARY AUTHORIZATION

9. In its HDO the Commission authorized BTW to resume programming. Specifically, the Commission stated:

> IT IS FURTHER ORDERED, That, in light of the interest in keeping the station operational during the pendency of this proceeding, we hereby grant special temporary authority for the station to operate substantially in accordance with the representations made in BTW's application for construction permit and pursuant to the technical modifications proposed in BMPCT-870610KU. KEEF-TV's silence has deprived the Los Angeles community of noncommercial educational television programming intended to meet the needs of its minority populations. Accordingly, we believe the public interest requires such temporary operations. This action does not represent any Commission predisposition toward the outcome of this case but merely allows temporary restoration of service by, or under the supervision of, the group whose control of BTW has already been passed upon and approved in a comparative proceeding, to wit: Mary Woodfork, Clint Wilson, Gary Cordell, Roy Campanella, Jr., Linda Pate, Titilola Payne Parker, Jerrome Duncan, and Rosa Ware. . . . Bylaws and other rules governing the interactions and decision-making procedures of the aforementioned members of the controlling body shall be submitted to the Mass Media Bureau within twenty (20) days of the release of this Order.

3 FCC Rcd at 5444 ¶ 10 (citations omitted).

10. BTW objects to the Commission's grant of the STA in that the Commission specifically conditioned the grant on the operation of KEEF-TV by BTW's original eight directors. BTW argues that the grant was made to individuals who had never requested an STA, either individually or collectively.

11. The Commission has broad discretion to attach appropriate conditions to the grant of an STA. In this case, we determined that any temporary operations should be carried out only by the entity of record that had applied for the station. At issue in this proceeding is whether, by making changes in its Board of Directors with neither notification to, nor authorization by, the FCC, BTW transferred control of the permittee without Commission approval, whether control was exercised by persons not authorized to do so, or whether there were attempts to mislead or deceive the Commission as to the true ownership and control of BTW. Although we found that a resumption of programming during the pendency of the hearing was in the public interest, it was reasonable, under the circumstances, to condition the grant of the STA upon operation by or under the supervision of the group whose control has been passed on and approved by the Commission. Accordingly, we find no reason to reconsider the STA grant.

IV. PETITION FOR STAY

12. In light of our decision to deny BTW's motion for leave to file a petition for reconsideration, its request to stay the hearing is moot. So too is BTW's request to stay the STA.

13. The HDO granted an STA to allow programming in the public interest to be restored to the Los Angeles minority community. *See* ¶ 9, above. The STA was specifically conditioned upon the submission of "Bylaws and other rules governing the interactions and decision-making procedures of the aforementioned [original] members of the controlling body" within 20 days of the release of the HDO. *See* ¶ 9, above. Although two sets of bylaws were submitted, neither submission demonstrates that the by-laws have been approved by all, or even a majority of, the members of the originally designated Board of Directors.[2] Furthermore, the STA granted in the HDO expired on March 13 and we are unaware of any request for extension having been filed. It further appears that Station KEEF-TV is not currently on the air. Because the original directors failed to submit binding bylaws, and the STA has expired, the station is not currently authorized to engage in any temporary operations. Accordingly, consideration of BTW's petition for stay of the STA is moot. We remain of the opinion that restoration of programming to the Los Angeles minority community is in the public interest. Therefore, we will consider a request from the controlling body, as described in the HDO at paragraph 10, for extension or reinstatement of the STA based on the facts and circumstances existing at the time the request is filed.

V. BILL OF PARTICULARS

14. The Bureau was directed by the Commission to serve the Bill of Particulars pursuant to 47 U.S.C. § 309(e) which provides that, when an application is designated for hearing, the Commission "shall forthwith notify the applicant and all other known parties in interest of such action and the ground and reasons therefor, specifying with particularity the matters and things in issue . . . ." BTW seeks to have the bill of particulars rescinded because "it contains erroneous findings as to material questions of fact, is procedurally erroneous, and is in conflict with established Commission policy. *Application for Review of Bill of Particulars*, at 1. The Bureau argues that service of a bill of particulars is not an "action" reviewable under 47 C.F.R. § 1.115(a).

15. We agree with the Bureau. The Commission has stated that a bill of particulars does not make findings or conclusions but simply "serves to inform the accused of the misconduct alleged so that the accused has an adequate opportunity to prepare a defense." *Faith Center, Inc.*, 82 FCC 2d 1, 9 (1980). BTW's Application for Review does not raise a question of notice, but rather whether the issues are overbroad and should be reconsidered. This argument is premature. The matter is now before an ALJ and matters relating to the adequacy and relevance of the issues are matters for his consideration in the first instance.

VI. ORDERS

16. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to File Petition for Reconsideration filed October 13, 1988 by Black Television Workshop of Los Angeles, Inc., IS DENIED; the Petition for Stay refiled November 7, 1988 by Black Television Workshop of Los Angeles, Inc., IS DISMISSED, as moot; and that the Petition for Reconsideration filed October 13, 1988 and the Application for Review of Bill of Particulars filed November 14, 1988 by Black Television Workshop of Los Angeles, Inc., ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Commission is aware that on March 23, 1989, the Review Board adopted a memorandum opinion and order granting BTW's Emergency Petition for Stay of the hearing in this proceeding for a period of two weeks. FCC 89R-18 (Apr. 3, 1989), recon. denied FCC 89R-20 (Apr. 5, 1989). In addition, on March 31, 1989, BTW filed "Exception to Ruling Not to Disqualify Presiding Judge." The arguments addressed herein are not intended to, nor do they, address any of the issues in either the above-mentioned Review Board orders or BTW's exception to ALJ Chackin's ruling not to disqualify himself.

[2] *See* letter from Daniel J. Simms filed October 3, 1988 and Tr. at 26-29.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-441

In the matter of

Technical compatibility protocol
standards for equipment operating
in the 800 MHz public safety bands.

MEMORANDUM OPINION AND ORDER

Adopted: February 22, 1989; Released: May 1, 1989

By the Commission: Commissioner Quello concurring and issuing a statement. Commissioner Dennis issuing a separate statement at a later date.

I. INTRODUCTION

1. On September 7, 1988, we released a *Notice of Inquiry* to explore the advantages and disadvantages of adopting a uniform trunking standard for radio equipment manufactured for trunked operation in the 821-824/866-869 MHz public safety spectrum.[1] In response to the *Notice* we received comments and reply comments from a variety of organizations and individuals representing public safety communications equipment manufacturers, the public safety community, and other interested organizations.

2. After careful consideration of the record developed herein, we have concluded that a Commission-mandated uniform trunking standard for analog communications is not necessary to achieve adequate interoperability among 800 MHz public safety entities. Our decision is not intended to prevent the industry from pursuing enhanced interoperability capabilities, either through the regional planning process established in the Public Safety National Plan proceeding,[2] or through the development of compatible trunked public safety communications systems. We conclude, however, that the steps we have taken to assure interoperability are adequate and that further federal intervention is not warranted at this time. We also conclude that the public interest will be served in this matter by the timely licensing of public safety communications systems. There is an immediate need for essential public safety systems in some areas of the country and the comments emphasize the importance of licensing these services without delay.

3. Our objective in this proceeding was to determine whether a trunked technology standard for analog communications [3] should be developed to achieve enhanced interoperability among various trunked public safety radio systems. We conclude that it would be inappropriate to consider imposing standards utilizing this existing technology at this time. Rather, we believe the public safety community's interest in interoperability and our overriding objective of providing maximum spectrum efficiency will best be served by focusing on the development and use of future technologies, *i.e.*, digital and other advanced communications technologies. Accordingly, we will initiate a further inquiry in this docket to explore the ways in which future radio communication technologies can be used to meet the evolving operational and spectrum needs of the public safety community.

II. BACKGROUND

4. On December 18, 1987, we released a *Report and Order* adopting policies, service rules, and technical standards to govern use of the 821-824/866-869 MHz public safety spectrum. Several petitions were filed asking reconsideration. On July 20, 1988, we adopted a *Memorandum Opinion and Order on Reconsideration* [4] addressing four of these petitions, including one filed by General Electric Mobile Communications Business (General Electric) seeking reconsideration of our decision in the *Report and Order* regarding trunking standards for equipment operating in the 800 MHz public safety spectrum. We concluded that a further proceeding was necessary to explore fully the question of trunking standards. We therefore released a *Notice of Inquiry* on September 7, 1988, requesting public comment on issues relating to technical compatibility protocol standards[5] for 800 MHz public safety equipment.

5. Although we received comments on General Electric's petition for reconsideration, the record was insufficient to support a conclusion regarding the trunking standards question. In particular, the comments did not fully discuss (1) the utility of standards or the time necessary to develop standards, (2) whether a trunking standard would result in interoperability, or (3) the effect trunking standards could have on the cost of radio equipment or on the evolution of trunking technology.[6] Accordingly, the *Notice* sought information on four issues central to the trunking question:

> 1) the timeframe necessary to develop a standard and market equipment using the standard;
>
> 2) how the use of a common signalling standard could enable intercommunication among different trunking systems operating on different channels;
>
> 3) the effect a common standard might have on the cost of equipment; and
>
> 4) the possible effect a standard might have on the development of radio communication technologies.

6. We received comments from a variety of organizations and individuals representing the equipment industry and the public safety community.[7] Most of the commenters addressed the primary concerns raised in the *Notice*, and a few offered various new suggestions and approaches to dealing with the trunking standards issue. There was, however, no consensus among the commenters on any of the major issues listed above, *i.e.*, interoperability, equipment cost, timing, and future technologies. There was, however, almost unanimous agreement that regardless of what we decide on the subject of trunking standards, licensing on the new 800 MHz public safety spectrum should not be delayed. In reaching our decision on whether to adopt uniform trunking standards, we gave great weight to this clear desire of the public safety community.

III. SUMMARY OF COMMENTS

Interoperability

7. In developing the National Plan for Public Safety[8] one of our primary objectives was to provide a mechanism that would enable different public safety entities to communicate with one another in emergencies. We concurred with the recommendation of the National Public Safety Planning Advisory Committee (NPSPAC)[9] that interoperability should be achieved through the use of five "mutual aid" channels contained in the 821-824/866-869 MHz bands. We agreed with its recommendations that the mutual aid channels operate in the conventional mode and that all mobiles and portable radios operating in the new bands be equipped to operate on all five channels. In our *Report and Order*, we directed the various regions to explain in their regional plans how the interoperability channels are to be managed.[10] In the *Report and Order*, we also gave regions, in the development of their plans, the freedom to provide for as many additional mutual aid channels as they deem necessary to satisfy their intercommunication needs. This type of flexibility was the cornerstone of the National Plan for Public Safety. Thus, in establishing the National Plan, we provided both the necessary spectrum as well as the various technical and operational rules to permit an organized and effective system for achieving regional interoperability.

8. Despite this effort, certain commenters believe that the mutual aid channel concept is inadequate to meet the needs for intercommunication among neighboring jurisdictions. For example, MX-COM, Inc. in its comments, feels that the mutual aid channels will "sit idle most of the time – and are probably inadequate to the traffic demands of a major calamity." MX-COM, Inc. Comments at 9. On the other hand, Orange County, California believes that to attain interoperability with neighboring agencies planning to implement 800 MHz trunked radio systems, the use of the conventional five mutual aid channels, supplemented by the two statewide mutual aid channels currently proposed in the Southern California Regional Plan, is more than adequate to meet the county's interoperability requirements. Orange County Comments at 4.

9. Another concern raised by several commenters was that the conventional mutual aid network is operationally inferior to the more sophisticated trunked intercommunication system during emergency situations. They point out that a computer-controlled trunked system is capable of dynamic regrouping of callers[11], positive identification of callers,[12] and other capabilities not available to the dispatcher in a conventional system. Motorola, Inc. (Motorola) points out, however, that through the use of "gateways,"[13] units of neighboring jurisdictions, whether transmitting on different bands or using different modes (trunked or conventional) of operation, can talk to each other efficiently. General Electric disputes the effectiveness of the gateway system, claiming that this procedure calls for units wanting to be patched through to another unit or group on a trunked system to "go through an elaborate process, which introduces delays and resulting inefficiencies that are virtually absent for calls that go from a caller directly into a trunked system." General Electric Reply Comments at 13.

10. In addition to the obvious disagreement among commenters concerning the technical and operational adequacy of the mutual aid network, there is also considerable disagreement over the more basic issue of whether the establishment of standard signalling protocols will, in fact, enable effective interoperability among trunked systems operating on different system protocols. The first and most obvious requirement necessary to permit communications between neighboring jurisdictions is that they be capable of operating on the same frequencies. Currently, frequency sharing arrangements exist among adjoining jurisdictions around the country, and these enable intercommunication during regional emergencies.[14] The advocates of trunking standards argue that, given this existing practice of intercommunication among agencies with similar trunked system protocols, the existence of a common signalling protocol standard would allow the same intercommunication among agencies operating with different system designs. North American Philips Corporation (Philips) further argues that such an approach that simply addresses the standardization of the *RF* protocols that link mobile units and base stations would allow an equipment manufacturer to incorporate in the design of equipment the various features desired by its customers. Philips Comments at 5.

11. The major source of controversy on the use of "frequency-sharing" to enable interoperation among incompatible trunked systems is not whether it is technically achievable, but whether it is operationally feasible or advisable to permit "roaming" to occur in emergency situations. The California Public-Safety Radio Association, Inc. (CPRA), in its comments, asserts that most law enforcement agencies may not want other users to enter into their systems during a disaster when queueing within a system is at a maximum.[15] CPRA states that the overload that would occur on a trunked system at this most critical time would be unacceptable. CPRA further points out that even if law enforcement agencies desired access by other selected users, the firmware and software changes in their control systems would be frequent and would require constant updates to all participating agencies' databases as units are added and deleted from the various forces or, as the Region 40 Public Safety Communications Planning Committee indicates, trunked systems are regrouped from time to time. Region 40 Comments at 1. While this would not be an insurmountable problem, CPRA expresses the concern that errors in the databases could create situations where appropriate personnel would not be able to access systems during emergencies. CPRA Comments at 4.

12. General Electric, in its reply comments, addresses the various operational concerns presented by roaming and points out that roamers today "can and do move from one adjacent trunked system to another manufactured by the same firm, [and that] existing trunked systems already have the management tools to control those callers." General Electric Reply Comments at 20. It suggests that if roaming does not present any problems today, then it is extremely unlikely to do so in the future. General Electric Reply Comments at 22. Philips indicates further that in the United Kingdom and other countries, the necessary software protocols and hardware have been developed to allow roaming within and between systems and that similar results could be achieved in the United States. Philips Comments at 22.

13. In addition to the various methods and procedures for achieving interoperability discussed in the preceding paragraphs, a new approach was offered and debated in the comments. This was the use of "multi-mode" radios. Mobile radios designed with multi-mode capability would be able to operate with the signalling protocols of more than one trunking system and would thus be able to communicate with more than one manufacturer's system. General Electric, a strong advocate of this approach, states that from an engineering standpoint, "all that is required is for program memory capacity to be expanded to contain the software that would enable radios to recognize and emulate other protocols." General Electric Comments at 7. One of the primary advantages offered by multi-mode radios, according to General Electric, is that "the acquisition of new systems could continue without risk of obsolescence of embedded trunking equipment," and that this would create "backward compatibility" that would eliminate adverse impact on existing systems. General Electric Comments at 8. General Electric suggests that all that would be required to begin development of multi-mode radios would be to overcome existing patent barriers through the cross-licensing of manufacturers' protocols, and General Electric consequently urges the Commission to establish a "framework" for manufacturers producing equipment to APCO-16 standards to cross-license their protocols. General Electric Reply Comments at 3.

14. The Associated Public-Safety Communications Officers, Inc. (APCO) offers support to the multi-mode radio concept to the extent that multi-mode radios offer an "optional approach which will permit Public Safety agencies to procure radio equipment which would be interchangeable in a communication system from multiple manufacturers." APCO Comments at 36. APCO, however, believes that the development of multi-mode radios is no different than development of any other type of equipment and thus sees no need for Commission involvement. APCO Comments at 36. While Philips agrees that a multi-mode radio has certain advantages, such as backward compatibility, it feels that this approach would require substantial development costs for manufacturers, could increase the probability of equipment failure, and could complicate equipment repair. Philips Reply Comments at 34. According to Philips, however, the primary impediment to multi-mode radios is that development will be impossible unless all manufacturers are willing to disclose their proprietary protocols, and Philips appears to be unsure as to whether all the major players would be willing to do so on a voluntary basis. Philips Reply Comments at 35.

15. Motorola, in its reply comments, expresses a number of its concerns about the multi-mode radio concept. First, it raises the question of whether a multi-mode radio would be limited only to systems that meet APCO 16 requirements. (Motorola indicates that only its system and General Electric's currently comply.) Motorola believes that there would have to be agreed upon minimum criteria that a system would have to meet to qualify, and the issue of which manufacturers' protocols should be included on radios and which should be excluded would be likely to be controversial and could have antitrust implications. Motorola Reply Comments at 9 and 15. Motorola further points out that the multi-mode radio concept "spreads the responsibility [for system failure] among multiple vendors," which is contrary to its position that public safety systems are best served by suppliers who take total responsibility for a complete communications system. Another drawback to use of multi-mode radios, according to Motorola, is that with the likelihood that manufacturers will enhance their systems periodically to bring new features to their customers, users of multi-mode radios will be required to upgrade their radios repeatedly to conform with the current state-of-the-art. Finally, Motorola agrees with Philips that multi-mode radios will be more expensive than today's single mode units, but perhaps equally as important, asserts that multi-mode radios (which contain the designs of different manufacturers) could cause operational difficulties for users and dispatchers. Motorola Reply Comments at 25-27.

Timing

16. In our *Notice of Inquiry*, we asked that commenters offer their estimates on how long it would take for the industry to develop a trunking standard and how long it would take before equipment built to that standard would be available on the market. There was no consensus among the equipment manufacturers on this question. There was general agreement, however, that if all or parts of existing standards were adopted, the process would proceed much more quickly than if a standard were developed from scratch. For example, Ericsson, Inc. believes that if a current, publicly-available[16] standard were to be chosen, a number of manufacturers could begin delivering equipment as soon as the standard were set. Ericsson Comments at 6. Philips agrees, stating that with regulatory leadership and industry cooperation, and using the British standard as a starting point, the process could be completed in a matter of months. Philips Comments at 25. Regardless of which standard is adopted, King Radio Corporation believes that manufacturers should be able to respond very quickly because most of the developmental effort would be in software rather than circuit design. King Radio Comments at 6.

17. Motorola states, based on the recent history of the standards process, that it will take 3 to 5 years for the industry to develop and agree upon a single trunking standard. On the length of time required to achieve equipment availability, Motorola makes no definite prediction, but points out that it took them four years after the APCO 16 recommendations were issued to market equipment that complied with those recommendations. Motorola Comments at 60-61. On the use of the existing MPT 1327 standard, Motorola has serious reservations as to its adequacy to meet the unique operational requirements of public safety users.[17] Thus, Motorola concludes that the suggested use of MPT 1327 as a starting point would provide little time advantage because the effort to adapt MPT 1327 for public safety use "would be akin to developing a brand new standard." Motorola Reply Comments at 30.

18. Philips, in its reply comments, disputes Motorola's claims of the inadequacy of MPT 1327. It specifically addresses a number of the "faults" in MPT 1327 identified by Motorola[18], and provides various technical explanations to refute Motorola's criticisms. Philips concludes that while MPT 1327 is not perfectly suited in all respects to public safety needs, it could easily be adapted to the U.S. public safety market. Philips Reply Comments at 23-27.

19. Despite the obvious disagreement among industry commenters on the length of time it would take to adopt a trunking standard and market equipment, there was one matter on which there was almost unanimous agreement. Nearly all commenters believed that regardless of the ultimate decision reached by the Commission on the trunking standards issue, there should be no impediment to the licensing of the new 800 MHz public safety spectrum. *See* E.F. Johnson Comments at 7.

Equipment Cost

20. Another key question raised in our *Notice* was the effect that the establishment of a trunking standard might have on the price and availability of equipment. We are concerned with both the effect on the initial cost of a system purchased by a public safety user and the cost of add-on or replacement equipment purchased by the user during the life of his system. Besides the discussion of the possible increased cost for multi-mode radio equipment (*see* paras. 13 and 14, *supra)* there was little reference in the comments to potential increases that might occur in the price of equipment if equipment were to be built to a common standard. Various commenters, however, alluded to the additional R&D work that would be needed to develop new circuit hardware and protocol software, and it is possible that the costs incurred by manufacturers in these efforts could be passed on to the purchasers. One commenter, DuPage Public Safety Communications (DuComm), also indicated the belief that if standards are adopted and are licensable, then the costs of the licensing fees could be passed on to the purchaser. Du-Comm Comments at 4.

21. The discussion of possible reductions in equipment costs centered around two closely related issues: 1) the effect standards might have on the use of the "sole-source" approach by agencies in the initial purchase of their systems, and 2) the possible effect standards might have on the use of the "second-source" option when purchasing future, add-on or replacement equipment.

22. Currently, some agencies choose the sole-source method when purchasing land mobile radio systems. In using this approach, they forego the possible cost advantages of competitive bidding for several possible reasons: 1) in order to take advantage of the unique system features offered by a particular manufacturer, 2) to use a manufacturer that can provide a turn-key system (to avoid expending funds to conduct detailed analyses and write specifications for proposals from several bidding manufacturers), or 3) the desire to have interoperability with a neighboring jurisdiction using a particular trunking system. The advent of a common trunking standard would probably not cause purchasers desiring the sole-source option for the first two reasons to change their decision to use this approach. Those who use sole-source to achieve interoperability, however, could prefer the multi-source option if that were to become available to them under a "trunking standards" environment. Electrocom, Inc. offered evidence of such a scenario in the State of Louisiana where the purchase of a particular manufacturer's trunked system by the State Police apparently forced a local jurisdiction within the state, desiring interoperability with the State Police network, to go "sole-source" and thus, in Electrocom's words "deny the public the benefits of competitive bidding." Electrocom Comments at 4.

23. It is argued by a number of commenters that beyond the lack of competition that can occur in the initial purchase of equipment when purchasers go "sole-source" because of the absence of compatibility among different systems, there also exists a more serious lack of competition that can occur when users cannot choose from a variety of vendors in the purchase of add-on and replacement equipment due to the incompatibility of different manufacturers' systems. These commenters state that public safety agencies would like to have the flexibility to obtain add-on and replacement equipment from more than one source and not be "locked-in" to the manufacturer that provided their basic system. They feel that if equipment can be acquired from a second source and there is competition from various manufacturers for the sale of this equipment, then the costs will be lower than if the buyer must, for system compatibility reasons, deal with the original vendor.

24. These users believe that the adoption of a common trunking standard will permit competition to occur by enabling different manufacturers to produce compatible equipment. For example, CPRA states that the present requirement that an agency purchase additional equipment from the same vendor may present some cost disadvantages. CPRA Comments at 2. Similarly, the Port Authority of New York and New Jersey points out that compatibility will enable the benefits of competition among manufacturers of public safety radio equipment to become available to public safety users and that the advent of competitive bidding among vendors "can only result in lower costs for public safety agencies and a greater spur to improvements in equipment itself among manufacturers and vendors." Port Authority Comments at 1 and 2. Spectrum Resources, Inc. (SRI) offers evidence in support of competition, stating that from its experience in assisting the purchase of equipment for governmental agencies, when a vendor is the sole source for equipment they have no reason to supply equipment at other than list price, while when these vendors are put in a competitive situation they almost always take a different position on pricing. SRI further indicates that in such a competitive environment "it is not unusual to see discounts from list price in the twenty-five to fifty percent range." SRI Comments at 3.

25. Other commenters suggest that there are better ways of approaching the "lock-in" problem than through federal intervention in the form of trunking standards. APCO, for example, states that agencies could include in their initial solicitation and contracting documents provisions designed to accommodate future system expansion. APCO further believes that there is sufficient competition in the radio communications market to enable buyers to establish reasonable terms for the equipment they are purchasing. APCO Comments at 11. The State of Florida Division of Communications (Florida) presents a different side to this argument, disputing claims that users may avoid monopoly pricing difficulties by sufficiently clever procurement and long-term contractual strategies. They note that equipment models and features often change over time, and that a change or discontinuance of a particular model generally negates existing contract terms. This, according to Florida, voids previously agreed-upon prices, necessitates contract re-negotiation, and almost always results in higher equipment costs to the purchaser. Florida Comments at 7. Philips, in its reply comment adds that merely knowing the price to be charged by an

original equipment supplier for future equipment add-ons and system enhancements is not the same as having the ability to choose from among multiple suppliers at the time the add-ons or enhancements are needed. Philips also points out that years after a system is installed, the manufacturer offering the best equipment at the best price "may be some relatively recent entrant into the marketplace, and the original system supplier may no longer be at all competitive in terms of quality or features or price." Philips Reply Comments at 20 and 21.

26. Ted Vratny, representing Du-Comm, supports the APCO position and similarly believes that the concern of pricing for add-on and replacement equipment is a contractual and administrative problem that can be dealt with effectively without the need for technical standards. From his experience as director of a large intergovernmental emergency communications agency, he has observed that it is more advantageous for an agency to make a careful initial decision that it can live with for several years. According to Vratny, this requires that administrators prepare adequate specifications and make every effort to implement long term solutions. In the final analysis, he points out, an agency does have the choice not to purchase equipment or delay projects that are not cost effective. Du-Comm Comments at 2-3.

27. Another consideration on the issue of "second-sourcing", as discussed by several commenters, is that some agencies may prefer to use one particular manufacturer's equipment for operational and technical reasons. As Orange County indicated, the locations of controls and displays can vary from vendor to vendor on otherwise compatible equipment, and that a radio system containing equipment built by several different manufacturers can create operational and training problems. Orange County Comments at 3. They further point out that for agencies that service their own equipment, having multiple equipment suppliers requires stocking of parts from different manufacturers and in some cases additional specialized test equipment. Orange County also emphasizes that due to the nature of the competitive process a trunking standard could force agencies to accept equipment from undesired vendors. Orange County Comments at 3. The Lenexa, Kansas Police Department makes the point that, at least from its perspective, it is desirable to have a single point of service contact for a complicated radio system, especially one involving trunking technology. They also indicate that, in a mixed "network" of equipment from several makers, a problem with any of the equipment could affect all users on the network. Lenexa Comments at 3. Ted Vratny (Du-Comm) concurs with this position, stating that it is extremely costly to "play mix and match" with radios and fixed-end equipment. When this occurs, Vratny claims, service times and costs often increase because technicians must be trained to repair different types of equipment. Vratny indicates further that to accommodate different systems one must maintain a larger inventory of parts for different manufacturer's equipment and that "this is taxpayer money sitting on the shelf." Du-Comm Comments at 3.

Future Technologies

28. An important consideration in analyzing the arguments for and against trunking standards is the concern that the adoption of a standard could retard or stifle future technological innovation in the field of trunking technology and in land mobile radio in general.

29. On the first point, the County of Los Angeles Facilities Management Department fears that because standards take a long time to develop they would be difficult to modify rapidly as new technologies become available. It further believes that a standard trunking system could have a stifling effect on creativity "as new technical improvements [could not] be implemented without obtaining agreement to change the standard, therefore limiting solutions to communications problems." County of Los Angeles Comments at 4. Motorola expresses a related concern that a trunking standard developed by a number of manufacturers could represent a compromise, or "common denominator" standard that would not be equal to the level of the more advanced systems. Such a scenario would be even more likely, according to Motorola, if industry representatives were ordered by the FCC to mandate a standard "or else" and if the overriding priority became to complete the task as quickly as possible. Motorola Comments at 18-19. Motorola states unequivocally that a standard mandated by the Commission will retard technology because new public safety systems from both Motorola and its competitors "will dry up as soon as an FCC proceeding to launch a standard is initiated." Motorola Reply Comments at 2. APCO agrees with this opinion, stating that if a standard were to be adopted "manufacturers would have little incentive to develop advanced products of any type, including digital, since they would then become non-standard." APCO Comments at 13. Philips does not share APCO's opinion that advanced technology would be retarded if a standard were to be adopted. They point to the current development underway to adopt a digital standard to supplement the current cellular analog standard, and indicate that adoption of a digital standard would not render analog radios obsolete. Philips Comments at 15. They further suggest that, over time, certain advances, such as digitization of voice communications, will occur in land mobile communications technology regardless of whether there is a trunking standard. Philips Comments at 15-16.

30. Dr. Michael Trahos, commenting for the Jefferson Hospital, Alexandria, Virginia, adopts a different argument for developing a uniform standard signalling protocol. He strongly advocates an eventual transition from present-day analog trunking systems to a standard digital trunking format, and suggests that only through the establishment of a uniform standard trunking protocol, preferably digital Time Division Multiple Access (TDMA),[19] will "an orderly transfer to an advanced technology more 'spectrum efficient' than our current analog FM" be realized. Jefferson Hospital Comments at 3. Corwin Moore, representing the Personal Radio Steering Group, Inc. (PRSG) takes a similar, long-term approach to the technology issue in his comments. He suggests that those seeking interoperability among radios operating with different 800 MHz trunked systems should recognize that the future radio is likely to become increasingly software-dependent (perhaps becoming, as he puts it, "a computer with an RF front end"), and that issues raised in the NOI (such as interoperability), should be addressed in the context of future directions in equipment technology. PRSG Comments at opening summary and 5-6.

IV. DISCUSSION

31. We initiated this inquiry to determine whether a trunking standard for current public safety communications equipment would achieve additional, useful interoperability that would otherwise not be obtainable, whether a standard would affect the cost and availability of radio equipment or the evolution of land mobile radio technology, and whether a standard could be developed within a reasonable time period. We were particularly concerned about the possible effect the mandated development of a standard could have on the expeditious use of the new 800 MHz channels by the public safety community. Manufacturers generally agreed that it would be likely to take three or four years to develop a trunking standard "from scratch," with additional time required to market equipment built to the standard. Given the possibility of such a protracted implementation period, we felt that any action we might take to direct development of a standard could create uncertainty among users and discourage the purchase of equipment, thus delaying operation on the new 800 MHz public safety bands. With the overwhelming consensus among commenters that licensing should proceed as quickly as possible, it would not serve the public interest for us to take any action that could cause such delays.

32. While we will not mandate development of a trunking standard for equipment operating with present-day technologies, it may be appropriate to consider the advisability of developing standards that could apply to the next generation of equipment; *i.e.*, the equipment that will be purchased in the next 5 to 15 years by public safety licensees to replace today's systems. Future, advanced communications systems could enable a higher form of interoperability than currently achievable, and could promote the competition among equipment manufacturers desired by many of the commenters while at the same time enabling the spectrum efficiency that will be needed to handle increased communications requirements. We will, therefore, explore the issue of standards and other matters relating to future radio communications technologies through the release of a further notice of inquiry.[20] Through this inquiry, we will attempt also to determine the proper role for the Commission in promoting the development of these advanced systems.

33. The comments did not indicate a clear consensus that common signalling protocols should be developed and adopted for 800 MHz public safety communications equipment. On the matter of interoperability, some commenters believed that the five mutual aid channels would provide a sufficient intercommunication capability among different trunked systems, while other commenters argued that the use of the "conventional" mutual aid network would not provide the enhanced operational sophistication offered by trunked systems. Also, in order to achieve any form of intercommunication among neighboring agencies, their systems must operate on identical frequencies, and this demands that the systems' mobile radios have a frequency "roaming" capability. While this roaming capability is technically achievable, some commenters expressed serious reservations as to whether it was operationally feasible or advisable in emergency situations. On balance, based on the inconclusive arguments offered by the commenters and our analysis of the issues, we conclude that the Commission should not attempt to enhance interoperability among trunked systems through the adoption of a common signalling standard.[21] Additionally, any enhanced interoperability through trunking standards at 800 MHz does nothing to improve interoperability between agencies that do not migrate to that band. Interoperability among such agencies requires local planning to cross-connect communications. While improvements at 800 MHz may be desirable, we must keep the broader picture in mind in developing methods for facilitating effective communications among public safety agencies.

34. With respect to the matter of whether the mandating of standards could affect the development of future land mobile radio technologies, we found that, as with the issue of interoperability, there was a diversity of opinion among the commenters. Some felt that the mandating of a standard could have a negative effect on the advancement of future radio systems, while others believed that development of a trunking standard for analog communications and the development of future digital technologies could proceed concurrently. Still others felt that the primary focus should be on the inevitable future conversion by the industry to digital modulation systems and more software-dependent formats which will enable more efficient use of the public safety spectrum.

35. We agree with this latter opinion and strongly believe that the future of all the services that the Commission regulates is critically dependent on the successful advancement of new and innovative ways to make better use of our limited spectrum. It would not serve the public interest for the Commission to take any action that could impede the industry's efforts to develop these more sophisticated communications technologies. The mandating of trunking standards by the federal government could have such an effect by forcing the industry to expend valuable research funds on present-day systems. With the currently used trunking technology more than a decade old, in an area where innovation occurs rapidly, it would neither be sound policy nor in the best interest of the public to require the further refinement of this technology to the detriment of future radio system development.

36. On the issue of equipment cost and availability, there are a number of manufacturers producing land mobile radio equipment at this time. We believe, therefore, that there is presently no need for federal intervention, in the form of a common trunking standard, to ensure competition in this industry.

V. CONCLUSION

37. In issuing our *Notice of Inquiry*, we attempted to obtain as much information as possible about all matters relating to existing trunking compatibility protocol standards. We received a considerable response from both the industry and the user communities and appreciate the extensive efforts of these parties. Our review of the comments convinces us that the procedures already established for interoperability on both the national and regional levels are sufficient to meet the current communications needs of the public safety community. In addition, we conclude that the uncertainty associated with the mandating of a trunking standard could cause public safety entities to delay the acquisition of equipment, thereby causing delays in the licensing and utilization of the much-needed 800 MHz public safety bands.

38. Finally, and perhaps most importantly, we believe that mandating an analog trunking standard could adversely affect the advancement of future land mobile com-

munications technologies. We are concerned that the natural evolution to these technologies could be impeded by federal demands for continued research and development of analog communications systems. We are especially concerned that more spectrally efficient methodologies be permitted to advance to help meet the future spectrum needs of the public safety community. The Notice of Inquiry that initiated this proceeding focused on many issues relating to the development of a trunking standard for analog communications. The comments, together with our analysis of the issues, have brought us to our present decision not to mandate the adoption of a trunking standard. The concerns raised by some of the commenters, however, and our recognition of the need for improved operational and spectrum efficiency in future public safety communications systems, indicate that further exploration of our role in fostering the development and implementation of future technologies is warranted.

39. Accordingly, we will issue, in the near future, a further Notice of Inquiry to gather information on the subject of digital or other advanced public safety radio technologies. Specifically, the Notice will raise questions relating to a number of issues, including 1) the desirability of digital transmissions for achieving efficient use of the spectrum, 2) the prospects for advancement of this technology by the industry, 3) the expected timeframe for development of the technology, 4) the use of a common digital transmission standard, and 5) the proper role for the Commission to play in this process. With respect to the matter of a trunking standard for analog communications, we conclude that the imposition of a federally-mandated standard would not be in the overall best interest of the public safety community.

VI. ORDERING CLAUSE

40. Accordingly, IT IS ORDERED that the Commission's consideration of the matter of trunking compatibility protocol standards for current 800 MHz public safety equipment is TERMINATED. This docket, however, will remain open for a further inquiry relating to the use of future, public safety radio technologies, as discussed herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

LIST OF COMMENTERS

Association of Maximum Service Telecasters

Associated Public-Safety Communications Officers, Inc. (APCO)

California Public-Safety Radio Association, Inc.

Carrollton, Texas

Connecticut Department of Public Safety Division of State Police

Connecticut Bureau of Statewide Emergency Telecommunications

Chicago, Illinois Police Department

Dade County, Florida Police Department

Dallas, Texas Department of Information Services

Defense Communications Agency (Department of Defense)

DuPage Public Safety Communications

Electrocom, Inc.

Ericsson, Inc.

Florida Joint Task Force on State Law Enforcement Radio Communications

Forestry, Conservation Communications Association

Ft. Lauderdale, Florida

General Electric Mobile Communications Business (General Electric)

Global-Wulfsberg Systems

Hattiesburg, Mississippi

Jefferson Hospital, Alexandria, Virginia

King Radio Corporation

Los Angeles, California

Los Angeles County, California Facilities Management Division

Maryland State Highway Commission

Motorola, Inc. (Motorola)

MX-COM, Inc.

National Association of State Telecommunications Directors

North American Philips Corporation (Philips)

Ohio State Highway Patrol

Orange County, California

Personal Radio Steering Group, Inc.

Port Authority of New York and New Jersey

Prince William County, Virginia

Region 40 Public Safety Communications Planning Committee

Representative Tommy F. Robinson, 2D District, Arkansas

Spectrum Resources, Inc.

Suffolk County, New York Police Department

T-CAS Corporation

Telecommunications Industry Association

Texas Department of Health

Tri-State Radio Planning Committee

Utah Division of Telecommunications

Utilities Telecommunications Council

LIST OF REPLY COMMENTERS

Associated Public-Safety Communications Officers, Inc. (APCO)

Associated Public-Safety Communications Officers, Inc. - Atlantic Chapter

Dade County, Florida Fire Chiefs Association

Dade County, Florida Fire Department

Dade County, Florida Police Department

Department of Commerce

E.F. Johnson Company

Fairfax County, Virginia

Florida Division of Communications

Ft. Lauderdale, Florida

General Electric Mobile Communications Business (General Electric)

Greenwich, Connecticut Department of Police

Frederick G. Griffin, P.C.

Hialeah, Florida

International Association of Chiefs of Police

International Municipal Signal Association & International Association of Fire Chiefs, Inc.

Jefferson Hospital, Alexandria, Virginia

Kansas Chapter of APCO

Lenexa, Kansas Police Department

Los Angeles County, California Facilities Management Department

Meriden, Connecticut, Police Department

Motorola, Inc. (Motorola)

North American Philips Corporation (Philips)

Palm Beach County, Florida Sheriff's Office

Port Authority of New York and New Jersey

Region 28 Public Safety Planning Committee

Region 40 Public Safety Planning Committee

Southern Lake Michigan 800 MHz Regional Planning Committee

Stratford, Connecticut Police Department

FOOTNOTES

[1] Technical Compatibility Protocol Standards for Equipment Operating in the 800 MHz Public Safety Bands, Gen. Docket No. 88-441, 3 FCC Rcd 5399 (1988) (*Notice*).

[2] *See* Development and Implementation of a Public Safety National Plan, Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987) (*Report and Order*), *aff'd*, 3 FCC Rcd 2113 (1988) (*Memorandum Opinion and Order*).

[3] Analog communications refers to the current modulation technique used in land mobile radio transmissions. An alterate modulation scheme is the more advanced and more efficient "digital" technique that is not generally in use in the land mobile services at this time, but is likely to be incorporated in future advanced technologies.

[4] *See* Memorandum Opinion and Order on Reconsideration, Gen. Docket No. 87-112, 3 FCC Rcd 5391 (1988).

[5] Technical compatibility protocol standards would create a common signalling technique that could allow radio frequency communication among equipment of different manufacturers. The individual *system* protocols of each manufacturer need not be identical to achieve intercommunication.

[6] *Notice* at para. 3.

[7] We received a total of 43 comments (8 from equipment manufacturers, 25 from the user community, and 10 from various associations and indiviuals). In addition, we received 29 reply comments (4 from equipment manufacturers, 17 from the user community, and 8 from associations and individuals). *See* Appendix A, *infra*, for a complete list of commenters and reply commenters.

[8] The National Plan is contained in our Report and Order in Gen. Docket 87-112, 3 FCC Rcd 905 (1987).

[9] NPSPAC was formed by the Commission to study all matters relating to the new 800 MHz public safety spectrum and provide recommendations to the Commission on usage of the spectrum. The membership of NPSPAC included a large number of individuals representing all areas of the public safety community including equipment manufacturers and federal, state, and local public safety agencies.

[10] Report and Order in Gen Docket 87-112, 3 FCC Rcd 905 (1987) at para. 52.

[11] Dynamic regrouping permits a dispatcher to direct a call to a particular "sub-fleet" that the caller wishes to speak to, and prevents access to the remaining users of the channel.

[12] Through pre-arrangement among neighboring jurisdictions, unit identifications can be exchanged so that when the mobile of a particular agency makes contact with the base station of another agency, the caller's authenticity can be verified.

[13] Using this procedure, cross-connections can be set up at dispatcher locations to enable units from different jursidictions to instantaneously communicate *upon* voice detection. Further, as Motorola indicates in its comments, dispatchers would have the capability to "set up" or "knock down" these connections "as the need for interoperability changes under different circumstances, regardless of the system protocols, operating frequencies, specific hardware used, or whether the communications are encrypted or clear." Motorola Comments at 47.

[14] Under such arrangements, the mobiles of one agency are permitted to operate on the mobile frequencies of another agency in order to make contact with that agency's base stations. This procedure requires that the transmitting *and* receiving channels of the neighboring agency be pre-programmed into the mobile units. If such frequency agility is taken one step further by permitting radio units to operate on all channels within a particular band (such as the 821-824/866-869 MHz bands) these units acquire "roaming" capability that permits them to contact, at least at the RF level, all neighboring base stations operating in the band.

[15] In trunked system operation, mobile units vying for available frequencies are placed in a queue. During normal circumstances, frequencies may become available instantaneously, but during an emergency, when many mobiles are brought to the scene and desire to communicate, there could be a considerable wait-time for a channel. The concern expressed by CPRA is that such a situation would place great strain on a system merely to satisfy the channel requirements of its own mobiles, without having the additional requirement of handling the channel requests of neighboring units.

[16] Ericsson may be referring here to the United Kingdom standard MPT 1327. MPT 1327 is a signalling standard for private land mobile trunked systems and was developed by equipment manufacturers operating under the direction of the British Department of Trade and Industry.

[17] Motorola claims that if MPT 1327 were adopted as an 800 MHz public safety standard, "channel access times would increase, system loading would be lower, and a number of features and requirements of APCO 16 would not be provided." Motorola Reply Comments at 30.

[18] These include Motorola's claims of 1) the lack of a continuous channel updating feature, 2) the lack of support for multiple priority level driven channel assignments during busy periods, 3) the lack of sufficient voice channel interference protection, and 4) the slow (1200 baud) signalling rate. *See* Motorola Comments at 61-62.

[19] With a TDMA format, according to Dr. Trahos, future advancements within digital technology will probably require only software changes.

[20] Our plan to release this inquiry tracks a similar effort by the National Communications System (NCS). NCS has issued a Notice requesting comment on a proposal to develop a new Federal standard for future generation narrowband, digital, encrypted VHF and UHF land mobile radios. *See* 54 Fed. Reg. 2245 (January 19, 1989).

[21] In making this decision we also considered the suggestion offered by General Electric to adopt the use of "multi-mode" radios that would be capable of operating with the signalling protocols of more than one trunking system. While multi-mode radios could be a viable option for enhancing interoperability, some commenters expressed concerns about various economic, technical and operational aspects of this approach. *See* paras. 13 and 14. In the final analysis, we believe that the manufacture and use of multi-mode radios could evolve naturally if driven by public safety users demand, and that could occur without the need for Commission action or intervention.

CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO

RE: Technical Compatibility Protocol Standards for Equipment Operating in the 800 MHz Public Safety Bands.

By today's action the Commission has missed another opportunity to address the needs of the public safety services. My dismay is tempered slightly by the fact that a further notice of inquiry will examine the standards issue for the next generation of public safety technology. In the meantime, by failing to address the standards issue for analog trunked technology, the Commission continues to foster the spread of technology that requires spectrum inefficient conventional channels to provide interoperability. Furthermore, as commenters stated, failure to require a single trunking standard drives up the cost of radio equipment used by public safety services and this ultimately affects the taxpayer. The Commission's response to the issue of equipment cost is to say that "there are a number of manufacturers producing land mobile radio equipment at this time," implying a competitive market for public safety 800 MHz trunked radios. (*See*, para. 36.) What the Commission fails to address is the question of whether a competitive market exists for the 800 MHz trunked radio market. Additionally, the Commission fails to mention that there is no competitive market for add-on equipment to its respective protocol. Establishing a trunking standard would create a competitive marketplace for add-on equipment, thus driving down the cost of such equipment.

The Commission argues that it is too late to develop a standard for analog trunk technologies. I disagree with the majority on this point. It is not too late. There are no public safety services currently operating in the 6 MHz allocated to public safety services for the national public safety plan. Furthermore, it will take several years before regional components to the national public safety plan are fully implemented. Estimates place the product life of analog trunked technology at fifteen years. In the real world of public safety services analog trunked technology will be used for at least the next 15-20 years.

I also disagree with the majority that mandating a trunking standard would thwart the advancement of future radio systems and that it would take too long to develop a standard. First, where is it written that a trunking standard would have to be developed "from scratch"? Trunking protocols already exists. Furthermore, it is a spurious argument to say that standards thwart the development of new technology. If this were the case, then we would have to scrap many communication technology and transmission standards developed by industries and endorsed by the government.

While failing to establish an analog trunking standard, the Commission does recognize the benefit of standards. In discussing the advisability of standards for the next generation of public safety services the Commission states:

> ...advanced communications systems could enable a higher form of interoperability than currently achievable, and could promote the competition among equipment manufacturers desired by many of the commenters while at the same time enabling the spectrum efficiencies that will be needed to handle increased communications requirements. We will therefore, explore the issue of standards and other matters relating to the further radio communications technologies through the release of a further notice of inquiry. (*See*, para. 32.)

The only real hope is the fact that public safety services are running out of spectrum and if necessity is the mother of invention, then more spectrum efficient technology will have to be developed. Perhaps at that point the Commission will have the insight to develop with industry the requisite standards necessary to ensure spectrum efficiencies and interoperability.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-88

In the Matter of

Inquiry into the Existence of
Discrimination in the Provision of
Superstation and Network Station
Programming

NOTICE OF INQUIRY

Adopted: April 12, 1989; Released: May 1, 1989

By the Commission:

I. INTRODUCTION

1. In the Fall of 1988, Congress passed legislation amending the United States Copyright Act[1] making its provisions applicable to transmission of certain types of satellite delivered programming.[2] The purpose of these amendments was to extend an interim statutory copyright license [3] to satellite carriers for retransmission of television programming of superstations and network stations.[4] Congress, in passing this legislation, was concerned about many legal and policy problems which have arisen as a result of programmers scrambling their satellite transmissions, thereby making programming unavailable to many, particularly residential users, who had been receiving the programming prior to scrambling.[5] Because of these concerns, Congress directed the Commission to prepare a report on whether discrimination exists against distributors in the distribution of this programming.[6] This *Notice of Inquiry* (*Notice)* is the initial step in the preparation of our report.

2. To assist in the preparation of our report, we request comments on the structure of the market involved in the distribution of superstation and network station programming and on the extent of any discrimination involved in all aspects of distribution. We invite comments from entities involved in the transmission and sale of programming as well as from other interested parties. In particular, we request comments from the United States Copyright Office on any reported complaints of discrimination as prohibited by the new legislation as well as any other information it is able to provide with respect to issues raised in this *Notice*.

II. BACKGROUND

A. Growth of Receive-Only Earth Stations

3. Congress has become increasingly concerned about the availability of satellite delivered programming to the growing number of individuals using satellite receive-only antennas at residential sites for reception of video programming. In the early 1970's when communications satellites were first launched, their primary use was not for television transmissions and thus there was not a significant amount of satellite delivered programming available.[7] In addition, at that time, all earth stations, including receive-only antennas, required licensing. Applications for a license required a demonstration of legal, technical and financial qualifications and were accompanied by frequency coordination showings demonstrating a lack of interference with terrestrial services. These earth stations were licensed for common carrier purposes.[8]

4. During these early years, the number of licensed earth stations was relatively small and their use for television transmissions was limited. However, in the mid-1970's, the Commission received an increasing number of earth station applications reflecting the growing importance of satellite delivered video programming. Accordingly, we began granting authorizations to cable television systems for earth stations to receive television programming.[9] We also authorized retransmission to cable systems throughout the United States of superstation[10] signals pursuant to common carrier authorization.[11] Two other regulatory actions taken by the Commission prompted an increase in the use of receive-only antennas. In 1976, we set standards by which smaller earth stations could be licensed,[12] and in 1979, we made licensing optional for domestic receive-only earth stations.[13]

5. Lifting restrictions on receive-only antennas resulted in the rapid development of small, less expensive equipment that did not need frequency coordination or licensing. In addition, the number of cable television systems grew substantially during the same period,[14] thereby increasing the demand for satellite delivered programming. As the demand for programming increased and costs to receive programming decreased, the supply of programming also increased. Residential users increasingly utilized earth stations to receive the programming being transmitted on the satellites. As a result, yearly sales of earth stations used to receive video programming at residential sites increased, according to one source, from approximately 4000 in 1980 to 625,000 in 1985.[15]

B. Scrambling Inquiry

6. The increased use of home earth stations as well as the growing financial investment in facilities to distribute programming prompted significant concerns by earth station owners and distributors about program accessibility. In 1984, in response to these concerns, Congress passed the Cable Communications Policy Act which, among other things, amended the prohibitions in the Act against unauthorized reception of transmissions.[16] These amendments provided an exemption from liability for private viewing of satellite cable programming that is not scrambled and for which a marketing system has not been established.[17] As a result, many programmers, concerned about protecting their economic interests in programming being transmitted over satellites, announced plans to begin scrambling their services.[18] Congress held hearings to determine the effect of this proposed scrambling on program availability.

7. In June 1986, Congress requested the Commission to initiate an investigation to evaluate and report on the effect that scrambling would have on the market for satellite delivered programming.[19] Accordingly, the Commission instituted a proceeding[20] which examined, among other matters, the availability and price of all programming accessible by home earth stations. In the context of

preparing its report, the Commission drew several conclusions about network station and superstation programming.

8. In the *First Scrambling Report* we discussed the issue of reception of network feeds by dish owners. We noted that these feeds, which are not intended for public reception, are used by the networks to transmit programming and other material to their local station affiliates. Some of this material is immediately broadcast, some is broadcast at a later time, perhaps after editing, and some is not meant for broadcast at all. The network feeds do not include local programming and advertising. In the *First Scrambling Report* we concluded that these were private communications, not satellite cable programming as described in Section 705 of the Communications Act and thus, even if unscrambled, were subject to the prohibitions against unauthorized reception.[21]

9. The network programming relevant to this *Notice*, however, is not private network feeds but instead is contained in the regular broadcast signals of stations affiliated with the networks. These signals are retransmitted over satellite facilities. Our previous discussion in the *First Scrambling Report* thus is not completely applicable.[22] In our *Second Scrambling Report* we discussed the current status of bringing both network and superstation broadcasts to dish owners and highlighted the uncertainty created by the lack of a clear copyright policy.[23] We also cited testimony by representatives of three commercial networks regarding their desire to reach unserved areas.[24]

10. Our discussion of superstation programming in the scrambling proceeding revolved around the issues of copyright licensing which have been addressed by the 1988 Amendments. In general, the *Second Scrambling Report* concluded that home earth station owners have access to most programming at comparable or lower prices than prices paid by cable subscribers and that the necessity for price regulation was not apparent at this time.[25] In a separate proceeding, we conducted an inquiry on the advisability of continuing to impose a compulsory licensing scheme on cable television transmissions.[26] Pursuant to that inquiry and prior to the adoption by Congress of the 1988 Amendments, we issued a News Release giving our preliminary conclusion that the compulsory license for cable retransmission of distant broadcast signals should be abolished.[27]

C. Copyright Act Amendments

11. The legislation which prompted this current study consists of amendments to the Copyright Act pertaining to retransmission by satellite carriers of broadcasts by network stations[28] and superstations.[29] The 1988 Amendments establish a statutory license for satellite carriers where they offer secondary transmissions[30] of superstation or network station programming to the public for private home viewing and charge a fee to either the ultimate subscriber or to a distributor who has contracted to deliver the programming to the viewer.[31] The statutory license for secondary transmissions of network stations is limited to service provided to persons who reside in areas not capable of receiving regular over-the-air broadcasts by that network and who have not recently subscribed to a cable system which carries that network.[32] Thus, satellite carriers may serve people residing in "white areas" without subjecting themselves to prosecution by the network for copyright violation by paying the copyright fee.

12. The 1988 Amendments provide a method by which royalties are calculated and paid to the Register of Copyrights by the satellite carrier engaged in secondary transmissions of superstations or network stations based on information submitted regarding the number of and identity of subscribers. This statutory license will expire on December 31, 1994 when Congress anticipates that the home satellite market will be developed sufficiently to operate without government intervention.[33] Penalties will be imposed for failure to comply with reporting and payment responsibilities. The Amendments also provide that it is an act of infringement for a satellite carrier to discriminate unlawfully against a distributor.[34]

13. Congress directed the Commission to undertake three studies in connection with the issues involved in the 1988 Amendments. First, the Commission will initiate a combined inquiry and Rule Making to determine the feasibility of imposing syndicated exclusivity rules on delivery of syndicated programming by satellite carriers.[35] Second, the Commission will examine the need for a universal encryption or scrambling standard for satellite programming.[36] Finally, the instant proceeding is to satisfy another Commission responsibility, to prepare and submit a report to Congress[37] on whether and the extent to which there exists unlawful discrimination by satellite carriers against distributors as described in 17 U.S.C. § 119(a)(6).[38]

14. The legislative history accompanying the 1988 Amendments support somewhat varying interpretations regarding the meaning of discrimination and the nature of the business arrangements that Congress wishes us to scrutinize in our report. Therefore, we are structuring our inquiry to solicit a broad range of comments to assist us in formulating an accurate picture of the market involved as well as to determine whether discrimination exists against distributors within the chain of distribution. To aid commenters in framing the issues they intend to address, we are including in this *Notice* several definitions taken from the 1988 Amendments.[39]

15. The following definitions are to be used in preparing comments in response to this *Notice:*

> Network Station: This definition includes by reference the definition given in § 111(f) of the Copyright Act. It is a television broadcast station that is owned or operated by, or affiliated with, one or more of the television networks in the United States providing nationwide transmissions, and that transmits a substantial part of the programming supplied by the network for a substantial part of the broadcast day. It includes any translator station or terrestrial satellite station that rebroadcasts all or substantially all of the programming broadcast by a network station.[40]
>
> Superstation: This is a television broadcast station, other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier.
>
> Primary transmission: This definition refers to § 111(f) of the Copyright Act. It is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.

Secondary transmission: This definition refers to § 111(f) of the Copyright Act and is the further transmitting of a primary transmission simultaneously with the primary transmission.[41]

Satellite Carrier: This is an entity that uses the facilities of a satellite or satellite service licensed by the Federal Communications Commission, to establish and operate a channel of communications for point-to-multipoint distribution of television station signals, and that owns or leases a capacity or service on a satellite in order to provide such point-to-multipoint distribution, except to the extent that such entity provides such distribution pursuant to tariff under the Communications Act of 1934, other than for private viewing.

Distributor: This is an entity that contracts to distribute secondary transmissions from a satellite carrier and, either as a single channel or in a package with other programming, provides the secondary transmission either directly to individual subscribers for private home viewing or indirectly through other program distribution entities.

Unserved Household: The term unserved household, with respect to a particular television network, means a household that – (a) cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network, and (b) has not, within 90 days before the date on which that household subscribes, either initially or on renewal, to receive secondary transmissions by a satellite carrier of a network station affiliated with that network, subscribed to a cable system that provides the signal of a primary network station affiliated with that network.

D. Present Commission Regulation

16. The extent of Commission regulation currently imposed on entities fitting the definition of satellite carrier in the 1988 Amendments varies and is dependent on a number of variables.[42] For example, these entities can be common carrier licensees, non-common carrier licensees, or non-licensees who are leasing satellite capacity on licensed facilities.

17. In 1983, as part of an ongoing proceeding instituted to study and adjust regulation of all common carrier services, we determined that domestic satellite service providers, including operators of earth stations as well as space stations which are not otherwise dominant in providing other communications services,[43] lacked sufficient market power to charge unreasonable rates and therefore should be subject to forborne regulation.[44] This decision relieved such carriers from the responsibility of filing tariffs and requesting line-by-line Section 214[45] authority to begin services.[46] However, their facilities must still be authorized under Title III of the Communications Act for use of the necessary radio frequencies.[47] In addition, forborne regulation does not exempt common carriers from the complaint procedures and anti-discrimination provisions in Title II of the Communications Act.[48] The Commission generally presumes, however that non-dominant carriers will be unable to engage in unreasonable discrimination.[49]

18. Satellite licensees also can be authorized to provide non-common carrier services. For example, "VSAT"[50] systems have been an increasingly popular way of providing internal communications links between company offices in widely dispersed geographic locations.[51] Companies using VSATs are neither holding themselves out to the public as providers of communications services nor are required to do so by law, but instead are transmitting their own originated information and thus cannot be considered common carriers.[52] Other entities that provide their own video programming to cable systems or to dish owners may also not be acting as common carriers and would not be authorized as such.[53] Title II restrictions against unreasonable discrimination and other Title II jurisdiction do not apply to such non-common carriers.

19. Finally, an entity may use the facilities of a satellite licensee on a leased basis or by virtue of buying transponder capacity and thus may not need to obtain any Commission authorization. The extent and nature of our Title II jurisdiction in this situation will vary depending on the circumstances.

20. The term "satellite carrier" as it is used in the 1988 Amendments may refer to a number of the entities described above. The extent of Commission regulation depends on the services provided and their regulatory classification. Where common carriage is involved, our Title II authority to prevent unjust or unreasonable discrimination applies.[54]

III. REQUESTED COMMENTS

21. The purpose of this proceeding is to ascertain to what extent unlawful discrimination against distributors is present in the distribution of television broadcast programming by satellite carriers. In order to formulate accurate conclusions, we must receive comments which are based on documented facts. Thus, we emphasize the necessity for commenters to include specific evidence as well as documented instances of discrimination. We request that copies of these comments be served on the entities alleged to be engaged in discrimination. We encourage submission of relevant documents, such as contracts, statistics, advertisements, articles or other similar material to aid our investigation. Finally, although we are requesting comments from all interested parties, we are particularly interested in information submitted by the United States Copyright Office because it is the agency charged with administering the Copyright Act.

22. In addition, in order to evaluate properly any allegations of discrimination, we are requiring United Video Inc., Southern Satellite Systems, Inc. and Eastern Microwave, Inc. to file with us certain contracts. These companies are operating as satellite carriers[55] and are subject to our jurisdiction under provisions of the Communications Act. In order to reduce any burden on these entities while ensuring that we have sufficient documentation to fulfill our Congressional mandate, we will place a limit on the number of contracts required to be filed. The above named entities shall file with the Commission their contracts with distributors[56] for the provision of satellite delivered superstation and network station programming with 1) the highest per subscriber rate, 2) the lowest per subscriber rate, and 3) a random sample of at least twenty other contracts with rates in between the highest and the lowest. If there are fewer than twenty contracts in this middle range, these satellite carriers should file all re-

maining contracts. These shall be submitted to the Commission on or before June 30, 1989 in the same manner as comments filed in this proceeding. These entities have the option of filing contracts pursuant to a request for confidential treatment in conformity with the Freedom of Information Act pursuant to Section 0.459 of the Commission's rules, 47 C.F.R. § 0.459.

A. Operation of the Market Involved

23. In order to establish a frame of reference to evaluate any evidence of discrimination, we need to gain an understanding of the manner in which the programming under scrutiny is distributed. Because the Commission does not currently regulate all aspects of satellite delivered television programming,[57] information submitted in connection with our licensing function does not provide a complete picture of this market.

24. Accordingly, we request that commenters give us information on the entities participating in the distribution chain for superstations and network stations, (*i.e.*, who are the satellite carriers and what, if any, distributors have they appointed) and their business relationships with respect to each other and to the ultimate consumer. We expect that these comments will be sufficiently detailed to reflect the different market structures that may be involved and will include identification of participants and the identification of Commission licensed facilities.

25. In addition, we request comments that will enable us to update our information about the extent of superstation distribution as well as the number and, if possible, geographic distribution of unserved households that would qualify as subscribers to network stations under the 1988 Amendments.[58] This will aid us in evaluating the impact of any evidence of discrimination.

B. Discrimination

26. The primary goal of this inquiry is to gather information about unlawful discrimination by satellite carriers against distributors as both of these are defined in the Copyright Act. Although "unlawful discrimination" is not further defined in the 1988 Amendments, legislative history indicates that this term is limited to discrimination within the Commission's jurisdication pursuant to the Communications Act.[59] Section 202(a) of the Communications Act[60] states that it is unlawful for a common carrier to engage in "unjust or unreasonable discrimination" in the provision of "like" communications services or to give any "unreasonable preference or advantage" to any person. In order to demonstrate a violation of Section 202(a), an entity must show that the services are "like", that discrimination has occurred, and that any such discrimination is not "just and reasonable."[61] This standard should be the basis of comments regarding the existence of discrimination and we request that parties comment on how we should interpret reasonableness in this context. We also seek comment on the propriety of applying this concept of "unlawful discrimination" to entities that are not common carriers.

27. Because the 1988 Amendments do not specify whether unlawful discrimination encompasses discrimination in pricing as well as in accessibility to programming,[62] we request comments on both. As a threshold matter, we seek comment on whether the discrimination prohibition in Section 202(a) can be interpreted as requiring the appointment of distributors at all.[63] The information submitted on these matters in connection with this *Notice* will allow us to supplement information received in our prior *Scrambling Inquiry* and include this in our report to Congress.

28. In submitting evidence of discrimination, commenters should also consider factors that would justify differences in prices charged to different types of distributors as well as differences in program availability in order to allow us to evaluate the reasonableness of any differentiations. For example, there may be sufficient economic reasons to justify setting a particular price for transmission to a large distribution system serving many earth station subscribers and a different price for a much smaller distribution system. Again, we emphasize the necessity for substantiated facts and statistics to support commenters' positions.

29. Finally, we request that commenters address the issue of whether we should consider enacting any regulations in this area. The 1988 Amendments do not direct us to enact any regulations, but the following passage in the *House Report* is relevant.

> Nothing in this Act affects the authority of the Commission to promulgate rules to address such discrimination and, in fact, this legislation amends the Communications Act with a new Section 713 directing the FCC to examine whether and to what extent such discrimination actually occurs. If the Commission finds regulations on discrimination against distributors of superstations and network stations to home earth stations to be necessary and in the public interest, it may establish such rules.[64]

Another relevant passage from the *House Report* states that

> The purpose of Section 119(a)(6) is to make certain discriminatory acts involving particular parties actionable under the Copyright Act. In adopting this language, the Committee does not intend the Commission to address issues and concerns that are outside its jurisdiction and expertise.[65]

30. Against this background, we seek comment on how we should interpret or define the word "unlawful" if we should decide to consider new regulations. Should we simply adopt the current standard as described in paragraph 25 of this *Notice*, or should we fashion a new one? We also seek comment on the criteria that we should consider using to judge discrimination in the event that we do move to a consideration of some new regulations. What guidance can we give to satellite carriers on the types of distinctions they can lawfully make among distributors.

31. We also request comments with respect to our jurisdiction to enact regulations in this area given the current status of our involvement. In addition, commenters should suggest alternatives addressing identified problems which might not entail regulatory action on our part, including sufficient detail to permit evaluation of their feasibility.

IV. CONCLUSION

32. This *Notice* attempts to identify the issues which may be relevant to our examination of the distribution market for satellite delivered network stations and superstations. Comments from any interested parties will be welcome and we particularly request the submission of factual statements, documented complaints and substantiating statistics in order that we can prepare an accurate and comprehensive report.

33. Authority for issuance of this Notice of Inquiry is contained in Sections 4(i), 303(r) and 403 of the Communications Act of 1934, as amended (47 U.S.C. Sections 154(i), 303(r) and 403). Pursuant to applicable procedures set forth in Sections 1.415, 1.419, and 1.430 of the Commission's Rules, interested parties may file comments on or before **June 30, 1989** and reply comments on or before **July 31, 1989.**

34. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary. Federal Communications Commission, Washington, D.C. 20554. Comments alleging acts of discrimination are requested to be served on the entity alleged to be engaged in discrimination. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554 and in the Domestic Facilities Reference Room (Room 6220), 2025 M Street, N.W. Washington, D.C. 20554.

35. For information concerning this proceeding contact Rosalee C. Gorman, Federal Communications Commission, Washington, D.C. 20554 (202) 634-1624.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 17 U.S.C. § 101 *et. seq.*

[2] P.L. 100-667, 102 Stat. 3935 at 3949 (1988), Satellite Home Viewer Copyright Act of 1988 (1988 Amendments).

[3] Such a license is in lieu of privately negotiated contractual arrangements between a copyright owner and the distributor. Fees are paid by the distributor directly to the Register of Copyrights for distribution by the Copyright Royalty Tribunal to the copyright owners. By paying the fees, the distributor protects itself from charges of copyright infringement. *See* Compulsory Copyright License for Cable Retransmission, 2 FCC Rcd 2307 (1987).

[4] H.R. Rep. No. 100-887 Part 2, 100th Cong., 2d. Sess. 10 (1988) (*House Report*). Superstation and Network Stations are defined in the Copyright Act and these definitions are included here for purposes of this inquiry at para. 15, *infra*.

[5] *See , e.g.*, Remarks of Senator Hollings, Cong. Rec. S16972 (1988).

[6] Discrimination is discussed at paras. 26-31, *infra*.

[7] Inquiry into the Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas, Notice of Inquiry (*Scrambling Notice*), 104 FCC 2d 1444, 1446 (1986). The *Scrambling Notice* gives a detailed history of the use of satellites in connection with television programming. It indicates that the major proposals in satellite space station applications filed in the early 1970's were for long-haul switched services to be provided by common carriers. *See also House Report* at 11. *See* Establishment of Domestic Communications-Satellite Facilities by Nongovernment Entities, 22 FCC 2d 86 (1970), for a discussion of possible uses, including video transmissions, of satellite facilities.

[8] *Scrambling Notice* at para. 5.

[9] *See , e.g.*, Florida Cablevision, 54 FCC 2d 881 (1975); *see also Scrambling Notice* at para. 6.

[10] *See* para. 15, *infra*, for a definition of superstation.

[11] *See , e.g.*, Southern Satellite Systems Inc., 62 FCC 2d 153 (1976).

[12] American Broadcasting Companies, Inc., 62 FCC 2d 901 (1976).

[13] Regulation of Domestic Receive-Only Satellite Earth Stations, 74 FCC 2d 205 (1979).

[14] In the mid 1970's, only 12-15% of the nation's households could be served by cable television systems. The number now is more than 80%. It is estimated that 51% of U.S. households actually subscribe to cable television service. *See* Telephone Company - Cable Television Ownership Cross-Ownership Rules, Sections 63.54-63.58, 3 FCC Rcd 5849 (1988) at para. 19.

[15] *Scrambling Notice* at para. 9. *See also* Satellite Week (January 9, 1989) at 6, where it was reported that sales of home earth stations in 1988 totalled approximately 290,000 units.

[16] *See* Section 705 of the Communications Act, codified at 47 U.S.C. § 605.

[17] Section 705 of the Communications Act, codified at 47 U.S.C. § 605. This section contains a general prohibition against unauthorized reception of transmissions. The 1984 amendments create an exception for reception for private viewing of satellite cable programming, *i.e.*, "video programming which is transmitted by satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers." 47 U.S.C. § 605(c)(1). The exception applies to satellite cable programming that is neither scrambled nor distributed pursuant to an established marketing system.

[18] Scrambling plans of at least some programmers predated the 1984 amendments.

[19] This report was requested at hearings before the Subcommitee on Telecommunications, Consumer Protection, and Finance of the House Energy and Commerce Committee on June 12, 1986 and was to be prepared in conjunction with the National Telecommunications and Information Administration (NTIA).

[20] Inquiry into the Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas, First Report (*First Scrambling Report*), 2 FCC Rcd 1669 (1987), and a Second Report (*Second Scrambling Report*), 3 FCC Rcd 1202 (1988), were adopted in connection with this inquiry.

[21] *First Scrambling Report* at para. 194.

[22] We concluded in that Report that network service via private network feeds to home earth stations could not be mandated, that provision of a specifically prepared "clean" feed might be prohibitively expensive and that a relatively small fraction of television households lie in so-called "white areas" (areas unserved by network stations). *Id.* at para. 198. For a discussion of network views on "white area" problems and solutions *see id.* at paras. 163-171. *See also* paras. 183-185 and 203-210 for additional relevant discussion.

[23] *Second Scrambling Report* at paras. 63-74.

[24] *Id.* at para. 72.

[25] *Id.* at paras. 75-78.

[26] Compulsory Copyright License for Cable Retransmission, 2 FCC Rcd 2387 (1987). *See* 17 U.S.C. § 111. *See* n. 3. supra, for an explanation of compulsory copyright license.

[27] News Release Report No. DC-1272, October 27, 1988.

[28] *See* para. 15, *infra*, for a definition of network station.

[29] 17 U.S.C. § 111 *et. seq.* (1988).

[30] *See* para. 15, *infra*, for a definition of secondary transmissions.

[31] 17 U.S.C. § 119.

[32] *See* para. 15, *infra*, for a definition of unserved household.

[33] *House Report, supra* n. 4 at 13 and 15.

[34] 17 U.S.C. § 119(a)(6). Acts of infringement could subject a satellite carrier to both civil suit by the copyright owner and possible criminal prosecution as well as seizures or forfeitures. 17 U.S.C. §§ 501-506 and 509.

[35] *See* Syndicated Exclusivity for Satellite-Delivered Programming, FCC 89-117,_____ FCC Rcd _____ (adopted April 12, 1989).

[36] 47 U.S.C. § 605 (§ 705) (f). *See* Inquiry into the Need for a Universal Encryption Standard for Satellite Cable Programming, FCC 89-104, FCC Rcd (released April 14, 1989). Amendments to this section also include new provisions with respect to piracy of satellite cable programming.

[37] The report is to be submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives.

[38] The mandate for this report is at 47 U.S.C. § 713, which is part of the 1988 Amendments.

[39] *See* 17 U.S.C. § 119(d).

[40] This includes stations owned by or affiliated with ABC, NBC, CBS, and PBS. *House Report, supra* n. 4 at 19.

[41] The definition in § 111(f) gives additional qualification with respect to the location of a cable system engaged in secondary transmissions.

[42] Congress recognized this fact when it enacted the 1988 Amendments and stated that " . . . the regulatory status under the Communications Act of the sale of superstations or network stations for private home viewing by dish owners is largely unresolved." *House Report, supra* n. 4 at 21.

[43] For example, AT&T, a licensee in the domestic satellite service, is still regulated as a dominant carrier.

[44] Policy and Rules Concerning Rates for Competitive Common Carrier Service and Facilities Authorizations Therefor, Fourth Report and Order, 95 FCC 2d 554 (1983).

[45] 47 U.S.C. § 214.

[46] Fourth Report and Order at *paras.* 35, 38.

[47] 47 U.S.C. § 301 *et seq.*

[48] *See* 47 U.S.C. §§ 201, 202 and 208.

[49] There is a presumption of lawfulness attached to service offerings by non-dominant carriers. Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 FCC 2d 1 at paras. 88-89 (1980).

[50] These are networks of small earth stations -- very small aperture antennas -- which are designed to communicate with each other or with a hub station. *See* Routine Licensing of Large Networks of Small Antenna Earth Stations Operating in the 12/14 GHz Frequency Bands, 51 Fed. Reg. 15067 (April 22, 1986).

[51] *See* , *e.g.*, Application of Southland Corporation, File No. 123/124/125-DSE-P/L-85.

[52] *See* National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied* 425 U.S. 992 (1976).

[53] For example, Home Box Office holds earth station authorizations that are classified as non-common carrier.

[54] 47 U.S.C. § 202.

[55] The term satellite carrier is used as defined in the 1988 Amendments. *See* para. 15, *supra*.

[56] This term is defined in the 1988 Amendments. *See* para. 15, *supra*.

[57] *See* discussion of the Commission's jurisdiction, *infra* at paras. 16-20.

[58] *See Second Scrambling Report* at para. 64.

[59] *House Report, supra* n. 4 at 27.

[60] 47 U.S.C. § 202(a).

[61] MCI Telecommunications Corp. v. FCC, 842 F.2d 1296, 1307 (D.C. Cir. 1988).

[62] Some legislative history suggests that Congress was interested only in price discrimination. *See* Remarks by Senator Leahy, Congressional Record, October 20, 1988 at S16975. Other statements indicate that we should study "any discrimination by those who retransmit television signals via satellite to home dish users." Remarks by Senator Hollings, *id.* at S16972. Additional information would imply that only discrimination unlawful under the Communications Act is prohibited but this source recognizes the limitations of our current jurisdiction and encourages the promulgation of any new rules in this area that we feel are necessary and in the public interest. *House Report, supra* n. 4 at 21-22.

[63] We note that the issue of distributor access to superstations and network stations is distinct from the issue of customer access to such programming. It appears that all of the superstations and network stations on satellite are available to customers directly from the satellite carriers, via nationwide toll free telephone numbers.

[64] *House Report, supra* n. 4 at 22.

[65] *Id.* at 27.

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen. Docket No. 89-89

In the Matter of

Imposing Syndicated Exclusivity
Requirements on Satellite Delivery
of Television Broadcast Signals
to Home Satellite Earth Station
Receivers

NOTICE OF INQUIRY AND NOTICE OF PROPOSED RULE MAKING

Adopted: April 12, 1989; Released: April 28, 1989

By the Commission:

1. On November 16, 1988, the President signed into law the Satellite Home Viewer Act of 1988,[1] which, *inter alia*, is intended to ensure the availability of satellite-delivered video programming to home satellite dish ("HSD") owners. With respect to our proceeding here, Section 203 of the 1988 Act added a new Section 712 to the Communications Act of 1934, as amended, that requires the Commission to initiate a combined notice of inquiry and proposed rule making by May 1, 1989, for the purpose of:

> (1) [d]etermining the feasibility of imposing syndicated exclusivity rules with respect to the delivery of syndicated programming (as defined by the Commission) for private home viewing of secondary transmissions by satellite of broadcast station signals similar to the rules issued by the Commission with respect to syndicated exclusivity and cable television; and
>
> (2) [a]dopting such rules if the Commission considers the imposition of such rules to be feasible.[2]

2. Our statutory responsibility under Section 712 is to determine whether it is feasible to promulgate syndicated exclusivity rules applicable to the delivery of syndicated programming to HSD owners and, if such rules are found to be feasible, to adopt them. Determining the feasibility of such rules requires consideration and resolution of a number of technical and economic issues. Accordingly, we solicit comment on a broad range of issues that focus on the questions posed by Congress: whether such requirements are in fact feasible for the HSD market and, if so, the manner in which these requirements should be fashioned to best serve the overall public interest. [3]

3. In our discussion below, we first ask for comment on whether technology exists that would enable satellite carriers to selectively delete programming for specific geographic areas in which a broadcaster has asserted exclusivity rights against the carrier and whether substitution of alternative programming is possible. We also request comment on the economic costs to satellite carriers of complying with syndicated exclusivity regulations in terms of purchasing the necessary hardware and performing the administrative tasks associated with such rules. Next, we request comment on the feasibility of alternative means of compliance, such as purchasing contractual rights to such programming. Then we discuss issues concerning the coverage of our potential rules. Finally, we request comment on the precise form the rules should take, including how closely they should parallel our cable rules, if we determine that exclusivity rules are feasible in the HSD context.

BACKGROUND

4. Before we discuss more fully the import of the regulatory features of this new legislation, it is important to understand the impetus behind them, the purposes and objectives intended by these features, and their interrelationship to other areas of Commission regulation, most notably, our revised cable program exclusivity rules. On May 18, 1988, we adopted a *Report and Order* readopting syndicated exclusivity rules applicable to cable systems.[4] These rules will permit broadcasters to again obtain and enforce exclusive exhibition rights to syndicated (*i.e.*, non-network) programming against cable carriage of the same programs on distant television broadcast signals retransmitted by a cable operator in the local station's broadcast area.

5. These cable syndicated exclusivity rules are intended to operate in tandem with the compulsory license for cable established by Section 111 of the Copyright Act of 1976 ("Copyright Act"), 17 U.S.C. § 111. Under the compulsory copyright license, a cable operator can carry broadcast programs without having to secure permission from the individual copyright owners. While the Commission's cable syndicated exclusivity regulations, together with the statutory compulsory license, clarify the rights and responsibilities of cable systems that carry broadcast signals, similar policy and legal issues relating to satellite carriers have been the subject of much debate.[5]

6. Courts and analysts of copyright law have differed in their interpretation of the 1976 Copyright Act as it relates to carriage by satellite carriers of broadcast signals to cable television systems, home satellite dishes, and others.[6] Some shared the view that satellite carriers engaged in such activities were exempt from copyright liability under the "passive carrier" exemption in the Copyright Act, which applies when a carrier "has no direct or indirect control over the content or selection of the primary transmission, or over the particular recipients of the secondary transmission."[7] Others, notably including the Register of Copyrights, differed with this interpretation and maintained that satellite carriers were outside the passive carrier exemption, especially when they engage in encrypting the signals or selling or licensing decoders.[8] Still others believed that satellite carriers were "cable systems"[9] within the meaning of the Copyright Act, and therefore eligible for the statutorily created cable compulsory license.[10]

7. Congress clarified the status of satellite common carriers under the 1976 Copyright Act by passing the 1988 Act, which amends the Copyright Act by establishing an interim compulsory license for satellite carriers (to expire on December 31, 1994).[11] Under new Section 119(a)(1), modeled in part after the cable compulsory

license provisions of the 1976 Act, a satellite carrier[12] is eligible for a license to retransmit both independent television broadcast stations (called "superstations"[13]) and, on a much more restricted basis, network stations. The compulsory license for carriage of superstations is available when the carrier retransmits a signal of a superstation to the public for private home viewing and charges, directly or indirectly, for that service.[14] In addition, under Section 119(a)(2), satellite carriers are granted a compulsory license in connection with the retransmissions of the signals of network stations, but only as to retransmissions to areas unserved by the network in question. The 1988 Act also provides that its provisions are to be the exclusive source of a compulsory license for the retransmissions of broadcast signals by satellite carriers.[15]

8. Thus, the 1988 Act establishes a clear legal framework by which satellite carriers are authorized to retransmit broadcast programming to HSD owners. Congress recognized, however, that unless carriers are subject to some form of exclusivity rules similar to those we have decided to apply to cable, satellite carriers could deliver broadcast signal programming notwithstanding exclusivity rights purchased by broadcasters. The Act requires us to initiate this proceeding because of concerns about the impact that satellite carriers' retransmissions of broadcast signals might have on local over-the-air broadcasting.[16]

9. From the 1988 Act and its legislative history, we believe that Congress intended an HSD market similar to that within which cable operates. Under the new statutory compulsory license, HSD viewers are guaranteed continued access to the programs of superstations and, where permissible, network stations. Congress, however, provided that this statutory scheme be implemented in conjunction with some degree of syndicated exclusivity protection for broadcasters, if feasible. With these underlying considerations in mind, we turn to how best to achieve these objectives.

DISCUSSION

10. Our task here is to determine the feasibility of syndicated exclusivity rules, similar to those promulgated in the cable/broadcast context, that would provide for local broadcaster acquisition of exclusivity protection against HSD exhibition of duplicate syndicated programming authorized by the new compulsory license until December 31, 1994. The Report of the House Committee on Energy and Commerce states that "while some adjustments may be necessary or appropriate to reflect the differences between cable and satellite technologies, the cable television syndicated exclusivity rules could serve as a model for rules governing the satellite industry."[17] In this regard, we will examine the technological and economic ramifications of applying syndicated exclusivity to the satellite industry, and, in light of these ramifications, determine what the scope of such rules should be. The Committee Report also states:

> [T]he Commission [is] to undertake a comprehensive assessment of the feasibility of imposing syndicated exclusivity. The Inquiry should be broadbased and balanced. The mere fact that imposition of, or compliance with, syndicated exclusivity rules might be incrementally more costly for satellite carriers [than for cable systems] shall not be deemed to render such rules as not 'feasible' as that term is used in . . . section [712 of the Communications Act, as amended]."[18]

With these guidelines in mind, we seek comment on the issues set forth below.

11. *Feasibility*. In considering the feasibility of applying some form of syndicated exclusivity rules to the HSD market, we discern two broad areas of inquiry. First is whether the technology exists for satellite carriers to delete protected programs and substitute others, and if so, the additional cost of using it. The second is whether other means of compliance, such as purchase by satellite carriers of national or local rights, are feasible alternatives to technological solutions.

12. It is our understanding that existing hardware permits satellite carriers to perform the deletion function. Present delivery systems employ Videocipher II decoders to control HSD owners' access to scrambled signals transmitted by satellite.[19] Using such systems, a consumer first notifies the programmer or other licensed distributor (usually via an "800" telephone number) that he or she wishes to subscribe to a particular program service. The programmer then sends a data message to a satellite cable programming computer authorization center to activate the subscriber's decoder. This authorization information is placed in an authorization channel that is part of the signal sent up to the satellite and retransmitted to the HSD owner. The HSD owner's decoder monitors the authorization channel for its unit address, which, when received, instructs the decoder to decode the particular channel or channels authorized.

13. According to recent testimony before a House subcommittee, systems utilizing Videocipher II decoders have deletion capability, a feature that was developed to accommodate sporting events subject to deletion (under our sports blackout rule),[20] but this design is predicated on the assumption that signals would only be deleted in a few areas and therefore cannot delete signals sent to the more numerous geographic areas that likely will be subject to syndicated exclusivity deletions. Moreover, these systems perform program deletions on a zip-code by zip-code basis. Such a geographic delineation may not be appropriate. Although a more precise deletion system would obviously be desirable in the HSD context, we recognize that additional expense and technological advancement might be needed to achieve that result, and that syndicated exclusivity rules nevertheless may be "feasible" even if such precision is not a practical option.[21]

14. We seek comment on whether the above is a fair and accurate assessment of today's technology and whether existing technology can utilize deletion functions and, if so, to what extent. In this regard, commenters should also discuss the level of precision in deleting programs that should be available in order for us to conclude that implementing syndicated exclusivity rules is feasible. We also request comment on whether the differences between zip codes and coverage areas present a significant problem, and if it does, how it might be resolved. In discussing the technical aspects of deletion (and other) functions, we urge commenters to describe in detail both the hardware and software aspects of the technology. For example, if a particular system's capabilities are limited by the software used, we ask that commenters discuss this fact, along with such issues as whether the software can be modified to expand such capabilities.

15. Even assuming that appropriate deletion functions can be achieved, there remains the issue of whether satellite carriers are technically able to substitute programming for that deleted, and, if not, whether substitution capabilities should be a prerequisite to our applying syndicated exclusivity rules to satellite carriers. The cable syndicated exclusivity rules authorize cable systems to substitute other programming for that which is deleted. It is not clear whether present technology can accomplish a substitution function in the HSD context. The most straightforward method of substitution would require at least one extra channel, other than the one that carries the programming subject to deletion, in order to carry other programs. This might significantly increase the cost of service and not be economically feasible for HSD delivery systems, in light of the relatively small home earth station market served by satellite carriers. Commenters should address whether this or other methods of programming substitution are feasible.

16. We seek comment on the precision and efficiency with which these deletion and program substitution functions can be performed. Commenters should address whether adequate equipment for such purposes is now in use, is in existence, or can be designed. If equipment does not now exist, we request estimates on development time and cost. In responding to these questions, commenters should give a function-by-function breakdown. For example, we wish to know if equipment for deletion purposes exists, apart from the existence of switching or substitution equipment. In addition, we seek comment on the capacity and degree of precision that any such equipment might have. If, for instance, a satellite carrier could only delete programming in a limited number of geographic areas, or if geographic areas could not be precisely delineated, commenters should specify these facts, explain the technological basis and detail the possibilities of achieving greater precision and capacity. We also wish to know how costs would be affected by the precision and capacity of the system in defining the area in which signals would be deleted and by the number of different programs and areas to be simultaneously deleted.

17. We also seek specific and detailed proposals that may yield alternative technical solutions. In this connection, we seek comment on whether syndicated exclusivity rules can be regarded as "feasible" even if satellite carriers cannot achieve reasonably efficient deletion and substitution performance. Alternative solutions could include deletion capabilities without the ability to substitute programming, or an inability to delete programming within precise geographic areas.

18. Our responsibility for determining the feasibility of developing syndicated exclusivity rules for the HSD market also requires that we consider the costs that compliance would place on satellite carriers, and whether the costs of such regulation would render rules infeasible as a practical matter. We recognize that the House Energy and Commerce Report states that such rules should not be deemed "infeasible" in the event we determine that the only impediment to their implementation is that the rules are incrementally more costly for satellite carriers than for cable systems. The same Report also states that our feasibility assessment is to be "comprehensive" and "broadbased and balanced."[22] By "incrementally more costly," we believe Congress meant costs not unreasonably greater than that required in the cable context, but did not mean costs of a totally different magnitude. Therefore, excessive costs of implementing such rules would raise legitimate questions regarding their feasibility for the HSD market. By excessive costs we mean costs that would completely overwhelm any asserted benefits of syndicated exclusivity for the HSD market. Thus, we solicit comment on the costs involved, such as those associated with the purchase of technical equipment and performing administrative duties, in relation to the congressionally-stated rationale for syndicated exclusivity in the HSD market.[23]

19. There are a variety of additional means that do not require the purchase of hardware capable of deleting and substituting distant signal programming that satellite carriers might employ in order to comply with syndicated exclusivity rules. For example, superstations might avoid having their syndicated programming deleted in some or all markets by purchasing national rights or by persuading syndicators not to sell conflicting local exclusivity rights to local broadcasters. Another possibility is that the satellite carrier or HSD distributor may obtain permission from the local broadcaster to retransmit the signal containing the syndicated programming, or the local broadcaster otherwise might be persuaded not to assert his program rights. These types of possible contractual arrangements between and among superstations, satellite carriers, HSD distributors, program suppliers and local broadcasters constitute alternative means of complying with possible syndicated exclusivity rules in the HSD context and could obviate any need for potentially expensive equipment to delete and substitute programs. Therefore, we also seek comment on the feasibility of rules in view of these possible compliance mechanisms that do not depend upon the technological and equipment concerns discussed above.

20. *Potential coverage of rules.* The 1988 Act does not specify what parties would be eligible for syndicated exclusivity protection under any rules we might adopt. Based on the statute's directive that we use syndicated exclusivity for cable as a model, we believe that the opportunity to purchase syndicated exclusivity in the HSD context should be available to all local television broadcast stations. Notwithstanding a suggestion in the legislative history that syndicated exclusivity should only protect independent stations,[24] the language of the statute indicates that syndicated exclusivity is intended to encompass all syndicated programs irrespective of whether the station involved is a network affiliate. Section 203 of the 1988 Act states that the Commission is to inquire into the feasibility of syndicated exclusivity rules "with respect to the delivery of syndicated programming (as defined by the Commission)." For the purposes of our cable syndicated exclusivity rules, a "syndicated program" is "any program sold, licensed, distributed or offered to television station licensees in more than one market within the United States other than as network programming."[25] Accordingly, it is our preliminary view that any HSD syndicated exclusivity rules should apply to broadcast stations regardless of whether they are network affiliates or independent stations. We solicit comment on our view.[26]

21. We also seek comment on whether the *distributors* of syndicated product should be eligible for protection from the unauthorized retransmission of their programming by satellite carriers, analogous to the protection that distributors receive under the cable rules, which provide:

> Distributors of syndicated programming shall be entitled to exercise exclusive rights pursuant to Section 76.151 for a period of one year from the initial broadcast syndication licensing of such programming anywhere in the United States; provided, however, that distributors shall not be entitled to exercise such rights in areas in which the programming has already been licensed.[27]

In light of Congress' expressed desire for symmetry between the syndicated exclusivity regulations for cable and HSD delivery systems, we solicit comment on whether exclusivity rights should be extended to distributors in the HSD context.

22. We also seek comment on which party in an HSD delivery system should be responsible for ensuring that syndicated exclusivity requests are honored. Congress appears to have intended that local broadcasters be entitled to assert syndicated exclusivity rights against satellite carriers, and that the carriers be liable for compliance. This conclusion follows from Congress' apparent intent that the interim compulsory license and the syndicated exclusivity rules operate in a complementary fashion as one integrated regulatory scheme. The House Energy and Commerce Report on the 1988 Act reflects this view, stating that "it is reasonable to premise a grant of a statutory license on the existence of appropriate safeguards to protect the rights of other parties who might be affected by the grant of such statutory licensees."[28] Given the interplay between the compulsory license and syndicated exclusivity in the 1988 Act, it appears to us that Congress intended to place the obligations of syndicated exclusivity on the beneficiaries of the statutory compulsory license, that is, on satellite carriers.

23. More specifically, the beneficiaries of the compulsory license established by the 1988 Act are the satellite carriers that retransmit the broadcasts of superstations when marketed by the satellite carrier directly, or indirectly through a distributor, for a fee.[29] In addition, pursuant to new Section 119(b) of the Copyright Act, the carrier has the duty to make payments to the Register of Copyrights as well as to provide information concerning the preceding six-month period about the stations that were retransmitted, the number of subscribers and any additional information that may be prescribed by regulation. The 1988 Act thus makes satellite carriers the principal beneficiaries of the compulsory license and then places on them the corresponding responsibilities of providing information about retransmissions and subscribers, and of making royalty payments.

24. Because the satellite carrier is the focal point of the benefits and obligations of the Section 119 compulsory license, and given the congressional intent that any syndicated exclusivity rules operate in concert with the interim compulsory license, we propose placing on the satellite carrier responsibility for compliance with any syndicated exclusivity rules we may adopt. For the purposes of the compulsory license provisions of the 1988 Act, "satellite carrier" is defined as

> an entity that uses the facilities of a satellite or satellite service licensed by the Federal Communications Commission, to establish and operate a channel of communications for point-to-multipoint distribution of television station signals, and that owns or leases a capacity or service on a satellite in order to provide such point-to-multipoint distribution, except to the extent that such entity provides such distribution pursuant to tariff under the Communications Act of 1934, other than for private home viewing.[30]

Under the proposal to place responsibility for compliance solely on satellite carriers, parties which are responsible for marketing and distributing retransmissions to HSD owners, but which do not own or use the satellite capacity (such as a third party program packager), would have no syndicated exclusivity obligations because they would be considered "distributors" rather than satellite carriers for Section 119(d)(6) purposes. We ask commenters to address whether, in these situations, it may be more appropriate to place the obligations and responsibilities of syndicated exclusivity on third-party distributors who actually market the program service to individual subscribers -- rather than on satellite carriers which retransmit the distant signals indirectly through these distributors -- since the distributor collects the fee directly from the HSD subscribers and will have access to the same information as does the carrier about the subscriptions and the retransmissions. Commenters should also consider the possibility of making satellite carriers and the third-party distributors jointly liable for compliance with any syndicated exclusivity rules developed in this proceeding. We request comment on whether such an approach would entail problems of enforcement or jurisdiction because these distributors may not be Commission licensees.

25. *Specific language for proposed syndicated exclusivity rules.* Given our directive to use the cable syndicated exclusivity rules as a model for HSD regulations, we propose to adopt rules for the HSD market which, to the extent possible, duplicate the provisions of the cable syndicated exclusivity rules. As mentioned above, under our recently adopted syndicated exclusivity rules for cable, a broadcaster can negotiate with program suppliers for enforceable exclusive exhibition rights with respect to syndicated (i.e., non-network) programming carried by a cable system located within the coverage area of the broadcast station. With a few limited exceptions, a station that has obtained such exclusive rights to a program may request the cable system not to carry that program as broadcast by any other television station, and the cable system must comply if properly notified. A cable system that is thus required to delete a program may substitute its own original programming, purchase programming from other sources, or substitute programming from a cable or broadcast signal. The rules also provide a cable operator with sufficient notification protection so that it has time to arrange for substitute programming and to inform its subscribers of schedule changes. We seek comment on what changes in the cable syndicated exclusivity model should be made if similar rules were to be applied in the HSD context.

26. As the legislative history of the 1988 Act recognizes, adjustments in the cable syndicated exclusivity rules may be necessary or appropriate before being utilized in the HSD context. We are particularly interested in comment on the following areas of concern. First, commenters should address the geographic extent of exclusivity that should be permitted. The cable syndicated exclusivity rules generally provide for either (a) a 35-mile maximum zone of protection, which enables a broadcaster to purchase exclusivity rights against all cable systems situated

up to 35 miles from the broadcaster's reference point, or (b) nationwide exclusivity, which allows a broadcaster to purchase rights that extend throughout the United States.[31] In the event commenters support the idea of affording exclusivity rights to distributors of syndicated product, we also propose to apply the same geographic limits that exist in Section 76.153(b) of our cable rules. We seek comment on any technological limitations inherent in the delivery of programming directly to HSD owners that may preclude precise drawing of protection zones for the HSD market. Specifically, we seek to determine the extent to which satellite carriers can delete programming delivered to HSD owners in specific geographic areas, if at all; and secondarily, the extent to which carriers can substitute other programming for that which is deleted. (*See supra* paragraphs 13-15.)

27. Second, we request comment on appropriate notification procedures in the HSD context. Using cable syndicated exclusivity as a guide, we propose provisions similar to the notice requirements in our present syndicated exclusivity rules. Generally speaking, under cable syndicated exclusivity, a local broadcaster must give the cable operator notice of having signed the exclusivity agreement with the program supplier, along with other required information, within 60 days of signing the contract, and the broadcaster is not entitled to exclusivity protection until at least 60 days after the cable operator receives this notice.

28. Third, we request comment on whether syndicated exclusivity rules for the HSD market should have a "sunset" provision that corresponds to the December 31, 1994, expiration of the compulsory license for satellite carriers.[32] As in cable, syndicated exclusivity and the compulsory license work in an interrelated fashion to balance the competing needs and interests of broadcasters and the satellite carriers with regard to the syndicated product. As discussed above, the legislative history of the 1988 Act clearly links the need for satellite carrier syndicated exclusivity rules with the satellite carrier compulsory license.[33] Accordingly, we propose that any syndicated exclusivity rules we adopt be terminated at the expiration of the interim compulsory license for satellite carriers. We also propose a transition period at the outset of the HSD syndicated exclusivity regime to allow satellite carriers to make the necessary technical and administrative adjustments to syndicated exclusivity. We seek comment on the appropriate length of this period. As a point of reference, we established a one-year transition period for cable syndicated exclusivity, which we subsequently extended by approximately four and one-half months.

29. Finally, we request comment on which subpart of the Commission's rules should contain the HSD syndicated exclusivity rules. Because satellite carriers may be licensees of fixed satellites or fixed satellite earth stations, Part 25 of the Code of Federal Regulations -- which governs operations by fixed satellite licensees -- may be appropriate. Parties are invited to comment on this and on whether applying these rules to entities regulated under Part 25 would raise any unique legal or regulatory issues that are not present in the cable television context. We also solicit comment on whether Part 25 might govern satellite carriers which are not also Commission licensees. Finally, we ask if other sections of the current rules need to be modified to accommodate HSD syndicated exclusivity rules.[34]

CONCLUSION

30. We have solicited comment on a wide a range of issues with respect to the feasibility of imposing syndicated exclusivity rules in the context of satellite-delivered programming. We stress that interested parties should comment with as much specificity as possible on these issues, and we encourage comment on any other issue that bears on the question of feasibility, even if it has not been explicitly raised herein.

ADMINSTRATIVE MATTERS

31. This *Notice* is issued pursuant to authority contained in Sections 4(i), 303, 308(b), 309(g), 319, 403 and 712 of the Communications Act, as amended. Under the applicable procedures set forth in Section 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **July 7, 1989,** and reply comments on or before **August 4, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

32. For purposes of this non-restricted notice and comment proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda, and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. *See* 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. *See* 47 C.F.R. § 1.1203.

33. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* 47 C.F.R. § 1.1202(b). Any person who submits a written *ex parte* presentation must provide, on the same day it is submitted, a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide, on the day of the oral presentation, a written memorandum to the Sec-

retary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See* 47 C.F.R. § 1.1206.

34. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA, which is set forth in Appendix A. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

35. *Paperwork Reduction Act Statement.* The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified requirements or burdens on the public. Implementation of any new or modified requirement or burden will be subject to approval by the Office of Management and Budget as prescribed by the Act.

36. For further information concerning this proceeding, contact David E. Horowitz, Policy and Rules Division, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

I. Reason for the Action:

This proceeding is initiated, as mandated by Congress, to determine the "feasibility" of imposing syndicated exclusivity rules on the delivery of syndicated programming to home satellite dish (HSD) owners, and, if feasible, to adopt rules implementing such rules.

II. Objective of this Action:

Congress instructed that a "comprehensive," "broadbased and balanced" proceeding be conducted to examine the benefits and drawbacks involved in imposing syndicated exclusivity rules on HSD delivery to minimize or to avoid an atmosphere whereby satellite carriers could deliver broadcast signal programming free from any constraints of exclusivity rights broadcasters had bargained for when they purchased syndicated programming. This imbalance can only be remedied by imposing some form of exclusivity rules on carriers similar to those imposed by the Commission on the cable industry.

III. Legal Basis:

This proceeding is initiated under authority contained in Section 712 of the Communications Act of 1934, as amended.

IV. Number and Type of Small Entities Affected by the Proposed Rule:

The type of small entities affected would, at this point in the proceeding, depend on the record composed in response to this *Notice*. If the record indicates that syndicated exclusivity rules could appropriately be imposed on HSD delivery, satellite carriers and television broadcasters would be affected by whatever rules and adopted.

V. Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule:

The compliance burden entailed in this proceeding ultimately depends on the record established as a result of this *Notice*. We are seeking comment on what, if any, type of syndicated exclusivity rules might be appropriate, on what the compliance costs might be, and on whether various aspects of the HSD industry and of HSD technology are similar enough to the cable industry and technology to expect that exclusivity rules currently imposed on the cable industry would produce the same benefits for the HDS industry. If exclusivity rules are found "feasible" for HSD delivery, the Commission proposes to make satellite carriers, as the principal beneficiaries of the statutory compulsory license, responsible for bearing the brunt of syndicated exclusivity obligations.

VI. Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule:

None.

VII. Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objective of the Action:

The Commission is seeking comment on alternatives and is open to any suggestions which would provide the same protection offered by syndicated exclusivity rules, with a minimum of cost or inconvenience to the HSD industry.

FOOTNOTES

[1] Pub. L. No. 100-667, 102 Stat. 3949 (amending 17 and 47 U.S.C.) [hereinafter, "1988 Act"].

[2] *Id.* at 3958 (to be codified at 47 U.S.C. § 612). These provisions are only one of the Act's components which, together, are designed to facilitate the delivery of programming to HSD owners, yet still compensate the program copyright holders for the programming being retransmitted by satellite carriers to HSD owners. Any syndicated exclusivity rules adopted will operate in concert with that part of the 1988 Act which creates an interim statutory compulsory license for satellite carriers to retransmit television broadcast signals of superstations and network stations to earth station owners for private home viewing. In addition to the syndicated exclusivity and compulsory license provisions, the statute also strengthens the penalties applicable to unauthorized descrambling or interception of satellite-delivered cable programming. *See id.* at 3959 (amending 47 U.S.C. § 605). Moreover, the 1988 Act directs the Commission to prepare and submit a report to various congressional committees that addresses whether, and to what extent, satellite carriers dis-

criminate against distributers. *See id.* at 3958 (to be codified at 47 U.S.C. § 613); *see also Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming* in Gen. Docket No. 89-88, FCC 89-115 (adopted April 12, 1989) (initiating FCC inquiry regarding such discrimination). Finally, the statute requires the Commission to initiate an inquiry into the need for a universal encryption standard for HSD users. *See* 1988 Act, 102 Stat. at 3958-59 (amending 47 U.S.C. § 605); *see also Inquiry into the Need for a Universal Encryption Standard for Satellite Cable Programming* in Gen. Docket No. 89-78, FCC 89-104 (released April 14, 1989) (initiating inquiry on universal encryption standard).

[3] Section 712 additionally provides that should the Commission adopt such rules, "any willful and repeated secondary transmission made by a satellite carrier to the public of a primary transmission embodying the performance or display of a work which violates such Commission rules shall be subject to the remedies, sanctions, and penalities provided by title V and section 705 of the Communications Act of 1934, [as amended]." 1988 Act, 102 Stat. at 3958 (to be codified at 47 U.S.C. § 612).

[4] 3 FCC Rcd 5299 (1988). These rules, to be codified at Parts 73 and 76 of Title 47 of the Code of Federal Regulations, are set forth in Appendix B of the *Report and Order*, 3 FCC Rcd at 5329-32, and were modified in part by our *Memorandum Opinion and Order* in General Docket No. 87-24, FCC 89-92 (released March 21, 1989).

[5] For a discussion of the debate in this area, *see* the Report of the House Committee on Energy and Commerce, H.R. Rep. No. 887, Part 2, 100th Cong., 2d Sess. 12-13 (1988) [hereinafter "House Energy and Commerce Report"].

[6] *Id.*

[7] 17 U.S.C. § 111(a)(3).

[8] House Energy and Commerce Report at 12. This Report explains that various analysts, including the Register of Copyrights (in his "preliminary judgment"), believe that most satellite carriers fall outside the definition of "passive carrier" because their activities exhibit control over the content and selection of the signal or over the signal's recipients, and do not consist of solely providing communications channels for use of others. *Id. See also* Report of the House Committee on the Judiciary, H.R. Rep. No. 887, Part 1, 100th Cong., 2d Sess. 13-14 (1988) [hereinafter, "House Judiciary Report"].

[9] The Copyright Act defines a cable system as "a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmission of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service." 17 U.S.C. § 111(f).

[10] This characterization, however, was expressly rejected by at least one court. *See Pacific & Southern Co. v. Satellite Broadcast Network*, 694 F. Supp. 1565 (N.D. Ga. 1988); *see also* House Judiciary Report at 14.

[11] 1988 Act, 102 Stat. at 3949-58, 3960 (to be codified at 17 U.S.C. §§ 119 and 119 note).

[12] *See* paragraph 24, *infra*, for statutory definition of "satellite carrier."

[13] A "superstation" is defined under new Section 119(d)(9) of the Copyright Act as "a television broadcast station, other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier."

[14] With respect to the retransmissions of superstations, new Section 119(a)(1) of the Copyright Act provides:

> Subject to the provisions of paragraphs (3), (4) and (6) of this subsection, secondary transmissions of a primary transmission made by a superstation and embodying a performance or display of a work shall be subject to statutory licensing under this section if the secondary transmission is made by a satellite carrier to the public for private home viewing, and the carrier makes a direct or indirect charge for each retransmission service to each household receiving the secondary transmission or to a distributor that has contracted with the carrier for direct or indirect delivery of the secondary transmission to the public for private home viewing.

For the definition of "private home viewing," see new Section 119(d)(5) of the Copyright Act.

[15] New Section 119(e) states that neither the cable compulsory license nor the exemptions of Section 111 (such as the passive carrier exemption) shall apply during the six-year statutory license period to secondary transmissions by satellite carriers for private home viewing of programming contained in a superstation or network station transmission.

[16] *See* House Energy and Commerce Report at 26-27. The legislative history also indicates that syndicated exclusivity rules for satellite carriers would "establish a level playing playing field between the cable television and earth station industries." House Judiciary Report at 28.

[17] House Energy and Commerce Report at 27.

[18] *Id.*

[19] The Videocipher II decoder has recently emerged as the *de facto* industry standard. *See Second Report* in Gen. Docket No. 86-336, 3 FCC Rcd 1202, (1988).

[20] *See* Statement of Dr. Mark F. Medress of General Instrument Corporation before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, U. S. House of Representatives (Nov. 19, 1987).

[21] We note that in the cable context, cable operators are generally required to honor exclusivity requests with respect to the entire cable community unit, even if the unit is located in part outside the broadcaster's geographic zone of protection. *See* 47 C.F.R. § 76.151(a) (1988) .

[22] *See* House Energy and Commerce Report at 27.

[23] We also request commenters to take into account the rationales for syndicated exclusivity that we set forth in our *Report and Order*, 3 FCC Rcd 5299 (1988), which informed Congress' decision to order us to initiate the proceeding here. In addition, we note that our proposals set forth below at paragraph 28 -- to terminate any syndicated exclusivity rules we may adopt in this proceeding upon the expiration of the interim compulsory license for satellite carriers, and to establish a transition period -- may affect the weighing of the costs involved with the purchase of technical equipment. Commenters should therefore take these factors into account as well.

[24] In discussing the congressional deliberations on the possible application of syndicated exclusivity to satellite carrier retransmissions of broadcast signals, the House Judiciary Report states at page 28:

> While the Committee concluded that the provisions dealing with network affiliated stations (the "white area" provisions) could not appropriately be applied to independent television stations, a further conclusion was made that *independent* television station owners of syndicated programming could be afforded similar protection, if feasible. [Emphasis added.]

[25] 47 C.F.R. § 76.5(nn) (1988). Network programming is defined as "any program delivered simultaneously to more than one broadcast station regional or national, commercial or noncommercial." 47 C.F.R. § 76.5(o) (1988).

[26] We also seek comment on whether such syndicated exclusivity rules should cover retransmissions of noncommercial signals. In our *Report and Order* in the cable syndicated exclusivity proceeding, *supra* note 4, we did not reach this issue. However, in our recently issued *Further Notice of Proposed Rule Making* in that docket, 3 FCC Rcd 6171 (1988), we requested public comment on the appropriate treatment of noncommercial stations. The staff is analyzing the comments received in that proceeding.

[27] 47 C.F.R. § 76.153(b) (1988). We note that the term "distributor," as used in this section of our cable rules, is different than the term as used in the 1988 Act. In our cable rules, a distributor generally is the initial program supplier who provides programming to television broadcast stations (or others) for subsequent dissemination to the public. A distributor under the 1988 Act, on the other hand, is defined as "an entity which contracts to distribute secondary transmissions from a satellite carrier and, either as a single channel or in a package with other programming, provides the secondary transmission either directly to individual subscribers for private home viewing or indirectly through other program distribution entities." 1988 Act, 102 Stat. at 3956 (to be codified at 17 U.S.C. § 119(d)(1)). In view of these different definitions of the same term, we request that commenters identify which meaning they intend when using the term.

[28] House Energy and Commerce Report at 27.

[29] The term "distributor" as used in this context is defined by new Section 119(d)(1) of the Copyright Act. *See supra* note 27.

[30] 1988 Act, 102 Stat. at 3957 (to be codified at 17 U.S.C. § 119(d)(6)). For a discussion of existing Commission regulation of entities fitting the definition of "satellite carrier" as characterized by the 1988 Act, *see Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming* in Gen Docket No. 89-88, FCC 89-115 (adopted April 12, 1989).

[31] We note, however, that the 35-mile zone of protection is currently the subject of an *Further Notice of Proposed Rulemaking* in Gen. Docket No. 87-24, 3 FCC Rcd 6171 (1988). Accordingly, we propose that geographic limits on syndicated exclusivity for the HSD market be adjusted to reflect any modifications of the cable syndicated exclusivity rules in that regard.

[32] Section 207 of the 1988 Act states that the interim compulsory license ceases to be effective on December 31, 1994.

[33] *See also* House Energy and Commerce Report at 13, 15 (indicating belief that after license expires, marketplace and competition should be sufficiently developed to serve needs of HSD owners); *Report and Order*, 3 FCC Rcd at 5339 n.204 (stating that if Congress rescinds cable compulsory license, syndicated exclusivity rules would appear to be superfluous).

[34] On a related note, we observe that our query regarding third party distributors, discussed above in paragraph 24, raises similar issues, since such distributors may not all be Commission licensees. We therefore request comment on what part of our rules should contain the obligations that we may impose on these distributors, in the event we decide that such obligations are warranted.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTINGHOUSE COMMUNICATION SERVICES, INCORPORATED — File No. CSG-89-046-P/L

Application for authority to construct and operate a 6/4 GHz international earth station at Boca Chica Key, Florida for provision of INTELSAT Business Services.

ORDER AND AUTHORIZATION

Adopted: April 21, 1989; Released: May 1, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on February 15, 1989, by Westinghouse Communication Services, Inc. (WCS) requests authority pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate international earth station facilities at Boca Chica Key, Florida, for the provision of INTELSAT Business Services (IBS). The application was placed on public notice on March 1, 1989. No comments were received. WCS has been granted blanket authority to establish and operate channels of communications between the U.S. and various international points for the provision of IBS.[1]

2. The proposed earth station will consist of an 11.3-meter antenna meeting INTELSAT Standard B technical parameters, communicating with an appropriate INTELSAT satellite in the Atlantic Ocean Region (AOR) operating in the limited 5925-5985 MHz and 6025-6256 MHz transmitting frequency bands and the 3700-4200 MHz receiving frequency band. The earth station will be constructed on customer premises at Boca Chica Key, Florida, and will be used to provide a full range of IBS services.

3. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television service earth stations and multipurpose earth stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose earth stations. It also determined that the public interest requires that IBS be introduced in the United States as soon as possible. The Commission therefore concluded that it would consider only the minimal legal, financial, and technical qualifications of the applicant as required by Section 308 and 319 of the Communications Act of 1934, as amended, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them. [3] The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[4]

4. WCS's legal, financial and technical qualifications to construct and operate the proposed earth station are established. WCS provides various international communications services including transborder services. The proposed earth station complies with INTELSAT Standard B technical parameters and WCS has completed frequency coordination for the bands 5925-5985 MHz, 6025-6256 MHz and 3700-4200 MHz.[5]

5. The scope of operation of the proposed earth station will be the same as that permitted by the Commission in previous IBS authorizations. We will limit the authorization to the provision of IBS and those video services compatible with the station's digital format operation. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed station. However, it may not provide any service which falls outside the IBS/television service category. Any use of the proposed station as a multipurpose earth station would require a separate application for the additional authority.

6. Upon consideration of the application, we find that authorization of the requested earth station facilities to provide IBS would serve the public interest.

7. Accordingly, IT IS ORDERED pursuant to Sections 304, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that application File No. CSG-89-046-P/L is GRANTED, and WCS is authorized to construct and operate the proposed 11.3-meter C-band earth station at Boca Chica Key, Florida, to provide IBS and related digital video services.[6] Before completion of equipment installation and facility activation, however, the applicant shall provide the Commission with a summary of equipment which was actually installed.

8. IT IS FURTHER ORDERED that WCS's earth station authorization is subject to coordination with other administrations in accordance with Article 11 of the ITU Radio Regulations.

9. This order is issued under Section 0.291 of the Commission's Rules and Regulations and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International
Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Westinghouse Communication Services, Inc., DA 89-274, released March 15, 1989, File No. ITC-89-024.

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS and/or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] *See* cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327 (released March 25, 1986).

[5] We note that international frequency coordination in accordance with Article 11 of the International Telecommunication Union (ITU) Radio Regulations has not been completed. Thus, authorization of WCS's Boca Chica Key earth station is conditioned on final coordination of the earth station with other administrations in accordance with Article 11 of the ITU Radio Regulations.

[6] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WOLD COMMUNICATIONS, INC. File No. CSG-88-072-P/L

Application for authority to construct and operate international earth station facilities at Sylmar, California for provision of international television service

ORDER AND AUTHORIZATION

Adopted: April 20, 1989; Released: May 1, 1989

By the Chief, International Facilities Division:

1. The captioned application, filed on July 12, 1988, by Wold Communications, Inc. (WOLD), requests authority, pursuant to Title III of the Communications Act of 1934, as amended, and Section 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate international earth station facilities at Sylmar, California, for provision of international television service. The application was placed on public notice on August 3, 1988. No comments were received. The applicant has been granted blanket authority to establish and operate channels of communication between the U.S. and various international points for provision of international television service.[1]

2. The proposed facilities will consist of a 15.5-meter antenna meeting INTELSAT Revised Standard A technical parameters connecting with INTELSAT satellites in the 5925-6420 MHz transmitting frequency band and the 3700-4200 MHz receiving frequency band. The facilities will be located at Sylmar, California and will be used to provide international television service to international points via Pacific Ocean Region (POR) satellites.

3. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose stations. It also determined that the public interest requires that IBS be introduced in the United States as soon as possible. The Commission therefore concluded that it would consider only minimal legal, financial, and technical qualifications of the applicant as required by Section 308 and 319 of the Communications Act, as amended, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them. [3] The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[4]

4. We believe that WOLD has the legal, technical and financial qualifications to construct and operate the proposed earth station facilities. WOLD is already providing domestic communications services, especially to the broadcast industry. It now proposes to provide international television service. The proposed earth station complies with INTELSAT Revised Standard A performance criteria for television earth station. WOLD has completed the necessary frequency coordination for the transmitting frequency band 5925-6420 MHz and receiving frequency band 3700-4200 MHz.

5. The scope of operation of the proposed station will be the same as that permitted by the Commission in previous authorizations. We will limit the authorization to the provision of international television service. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed stations. However, it may not provide any service which falls outside the IBS/television service category. Any use of the proposed station as a multipurpose earth station would require a separate application for the additional authority.

6. Upon consideration of the application, we find that authorization of requested services and facilities is in the public convenience and necessity.

7. Accordingly, IT IS ORDERED, pursuant to Sections 304, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that application File No. CSG-88-072-P/L is GRANTED, and WOLD is authorized to construct and operate the proposed earth station facilities at Sylmar, California, to provide international television service.[5] Before completion of equipment installation and facility activation, however, the applicant shall provide the Commission with a summary of equipment which was actually installed.

8. IT IS FURTHER ORDERED that Special Temporary Authority (CSG-88-072-P/L-T-1) granted on September 28, 1988, is hereby terminated.

9. This order is issued under Section 0.291 of the Commission's Rules and Regulations and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Wold Communications, Inc., Mimeo No. 5822, released July 18, 1986, File No. I-T-C-86-106.

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] *See* cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327 (released March 25, 1986).

[5] This authorization is not to be construed as permitting the provision of television between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-94

In the Matter of

Amendment of Section 73.202(b), RM-6631
Table of Allotments,
FM Broadcast Stations.
(Huron, South Dakota)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 19, 1989; Released: May 1, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Dakota Broadcasting, Inc. ("petitioner") requesting the substitution of Channel 256C1 for Channel 221A at Huron, South Dakota, and the modification of its license for Station KURO-FM to specify the higher powered channel. Petitioner states that it will apply for the channel, if allotted. Channel 256C1 can be allotted to Huron in compliance with the Commission's minimum distance separation requirements and can be used at the station's present transmitter site.[1]

2. As requested, we shall also propose to modify petitioner's license for Station KURO-FM to specify operation on Channel 256C1. In accordance with Section 1.420 of the Commission's Rules, Station KURO-FM's license may not be modified herein to specify non-adjacent Channel 256C1 if a competing expression of interest is received unless there is an additional equivalent class channel available for allotment. To this end, petitioner states that Channel 286C1 can be allotted if such interest is expressed.

3. We believe the public interest would be served by proposing the substitution of Channel 256C1 for Channel 221A at Huron, South Dakota, since it could enable Station KURO-FM to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Huron, South Dakota	221A	256C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 23, 1989,** and reply comments on or before **July 10, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Ross A. Johnson, Vice President
Dakota Broadcasting, Inc.
51 Broadway
P.O. Box 8310
Fargo, North Dakota 58109-8310
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 44-20-46 and West Longitude 98-12-34.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-95

In the Matter of

Amendment of Section 73.202(b) RM-6569
Table of Allotments,
FM Broadcast Stations.
(Churchville and Luray, Virginia)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: April 19, 1989; Released: May 1, 1989

By the Chief, Allocations Branch:

1. Peter W. Lechman (petitioner), has filed a petition for rule making with the Commission seeking the substitution of Channel 292B1 for Channel 294A at Churchville, Virginia, and the modification of his construction permit for Channel 294A to specify operation on the higher class channel. In order to accommodate the upgrade at Churchville, petitioner has requested the substitution of Channel 289A for Channel 292A at Luray, Virginia, and the modification of the license for Station WLCC(FM) to specify the new Class A channel.

2. Channel 292B1 can be allotted to Churchville in compliance with the Commission's minimum distance separation requirements at the site specified in the construction permit for Channel 294A,[1] if the channel change is made at Luray.

3. As requested, we shall propose to modify the construction permit for Channel 294A at Churchville to specify operation on Channel 292B1. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Churchville.

4. We are herein issuing a *Show Cause Order* to Commonwealth Audio Visual Enterprises, licensee of Station WLCC(FM) at Luray seeking comments as to why its license should not be modified to specify operation on Channel 289A in lieu of Channel 292A. Commission policy requires that Station WLCC(FM) be reimbursed for the reasonable costs of changing its frequency. Petitioner has stated his willingness to reimburse Station WLCC(FM).

5. Churchville is located within the protected areas of the National Radio Astronomy Observatory "Quiet Zone" at Green Bank, West Virginia. Petitioner will be required to comply with the notification requirement of Section 73.1030(a) of the Commission's Rules.

6. In view of the fact that Churchville, Virginia, could receive its first wide coverage area FM service the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

City	Channel No. Present	Proposed
Churchville, Virginia	294A	292B1
Luray, Virginia	280A, 292A	280A, 289A

7. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Commonwealth Audio Visual Enterprises, licensee of Station WLCC(FM), Channel 292A, Luray, Virginia, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 289A in lieu of Channel 292A.

8. Pursuant to Section 1.87 of the Commission's Rules, Commonwealth Audio Visual Enterprises may, not later than **June 23, 1989** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Commonwealth Audio Visual Enterprises, to furnish additional information. If Commonwealth Audio Visual Enterprises, raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Commonwealth Audio Visual Enterprises, will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Commonwealth Audio Visual Enterprises
P. O. Box 387
Luray, VA 22835

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before **June 23, 1989** and reply comments on or before **July 10, 1989** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Jeffrey D. Southmayd
Southmayd, Powell & Taylor
1764 Church Street, N.W.
Washington, D. C. 20036
(Counsel for petitioner)

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are 38-09-52 and 79-08-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-96

In the Matter of

Amendment of Section 73.202(b), RM-6658
Table of Allotments,
FM Broadcast Stations.
(Harrisonville and Carrollton,
Missouri and Girard, Kansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 19, 1989; Released: May 1, 1989

By the Chief, Allocations Branch:

1. Before the Commission is a petition for rule making filed by KCFX Radio, Inc. (petitioner), requesting the substitution of FM Channel 266C1 for Channel 264C at Harrisonville, Missouri. Petitioner also requests modification of its license for Station KCFX(FM), to specify operation on Channel 266C1. Petitioner further requests the substitution of FM Channel 264C1 for Channel 266C at Carrollton, Missouri, and modification of Station KMZU's license to specify the C1 channel. Kanza, Inc. (Kanza) licensee of the Carrollton station has filed a statement consenting to the substitution of channels.

2. In support of its proposal, petitioner states that the substitution of channels at Harrisonville and Carrollton will allow both stations greater latitude to improve their facilities. According to petitioner, Station KCFX(FM) is currently short-spaced to noncommercial Station KKFI-(FM), Channel 211C1, Kansas City, Missouri, as a result of a waiver, which will be removed with the requested substitution. Furthermore, petitioner believes the plan to improve the facilities of Station KCFX(FM) and KMZU will make more spectrum space available to other potential users furthering the public interest.

3. Channel 266C1 can be allotted to Harrisonville, Missouri, in compliance with the minimum distance separation requirements provided Channel 266A is deleted from Girard, Kansas.[1] Petitioner has proposed the substitution of Channel 256A for Channel 266A at Girard. The proposed substitution at Girard can be accomplished in compliance with the minimum distance separation requirements at the current site of Station KYPG, Girard.[2] In accordance with Section 1.420(g) of the Commission's Rules, we shall propose the modification of the license for Station KCFX(FM) to specify operation on Channel 266C1 at Harrisonville, Missouri. Lowell Communications, L.P., the licensee of Station KYPG, has filed a statement consenting to the substitution of channels. Channel 264C1 can be allotted to Carrollton in compliance with the minimum distance separation requirements at the licensed site for Station KMZU, Channel 266C. [3] As requested, we shall propose to modify the license of Station KMZU to specify operation on Channel 264C1 in accordance with Section 1.420(g) of the Commission's Rules.

4. Whenever an existing licensee is ordered to switch frequencies in order to accommodate a new channel allotment, we require that the proponent of the new allotment make a commitment that it will reimburse the affected station for the costs incurred in changing frequencies. Petitioner has indicated its willingness to reimburse the licensee of Station KYPG, Girard, Kansas, for its costs in implementing the change in frequency in accordance with Commission policy.

5. In view of the above, the Commission believes the public interest would be served by proposing the requested channel substitutions. Accordingly, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below:

	Channel No.	
City	Present	Proposed
Carrollton, Missouri	266C	264C1
Harrisonville, Missouri	264C	266C1
Girard, Kansas	266A	256A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **June 23, 1989,** and reply comments on or before **July 10, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Martin R. Leader
John J. McVeigh
Fisher, Wayland, Cooper & Leader
1255 - 23rd Street, N.W.
Suite 800
Washington, D.C. 20037
(Counsel for the petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by

the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 266C1 at Harrisonville are 39-00-57 and 94-30-24.

[2] The coordinates for Channel 256A at Girard are 37-29-02 and 94-50-08.

[3] The coordinates for Channel 264C1 at Carrollton are 39-22-05 and 93-29-40. Alternate coordinates for Channel 264C1 at Carrollton are 39-21-59 and 93-24-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-329

In the Matter of

Amendment of Section 73.202(b),	RM-6355
Table of Allotments,	RM-6528
FM Broadcast Stations.	RM-6527
(Boonville, Huntsville, Osceola,	RM-6529
and Wheeling, Missouri[1])	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 19, 1989; Released: May 1, 1989

By the Chief, Allocations Branch:

1. In response to a petition filed by Big Country of Missouri, Inc. (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 4309 (1988), proposing the substitution of FM Channel 257C2 for Channel 257A at Boonville, Missouri. Petitioner also requests modification of its license for Station KDBX-FM, to specify operation on Channel 257C2. In response to the *Notice* three counterproposals were filed.[2] Michael S. Rice (Rice) requests the allotment of FM Channel 257A to Osceola, Missouri, Kenneth W. Kuenzie (Kuenzie) requests the allotment of FM Channel 256A to Huntsville, Missouri, and John E. Hoehn (Hoehn) requests the allotment of FM Channel 257A to Wheeling, Missouri. Petitioner filed comments in response to the *Notice*, restating its intention to file an application for Channel 257C2 at Boonville. Petitioner also filed reply comments in response to the counterproposals. Michael S. Rice filed late supplemental comments, to which Big Country of Missouri, Inc. responded with a Motion to Strike. [3]

2. Rice's counterproposal requests the allotment of FM Channel 257A to Osceola, Missouri, as that community's first local FM service. According to Rice, allotment of Channel 257A at Osceola represents a more efficient use of the FM spectrum than the proposed upgrade at Boonville. Rice states his intention to file an application for Channel 257A at Osceola, Missouri.

3. Kuenzie counterproposed the allotment of FM Channel 256A to Huntsville, Missouri, as a first local service in that community. Kuenzie includes an engineering report showing Channel 256A can be allotted to Huntsville, and states that he would file an application for the channel.

4. Hoehn counterproposes the allotment of FM Channel 257A to Wheeling, Missouri, as that community's first local FM service. Hoehn states that the allotment of Channel 257A to Wheeling is possible only by retaining Channel 257A at Boonville and by denying petitioner's proposed upgrade request for Station KDBX-FM. Hoehn stated his intention to file an application for a new channel at Wheeling.

5. Petitioner, in reply comments, continues to support the substitution of Channel 257C2 for Channel 257A at Boonville, Missouri, as that community's first wide coverage area channel. Petitioner responded separately to each counterproposal filed in this proceeding, finding an alternate channel for each community that will not conflict with the proposed upgrade at Boonville. Petitioner demonstrates in his engineering analysis that Channel 223A can be allotted to Huntsville, Missouri, without a site restriction, while Channel 222A can accommodate the needs of Osceola, Missouri, with a site restriction, and Channel 261A will provide a first FM broadcast service for Wheeling, Missouri, with a site restriction. Further, the allotment of these alternate channels to Huntsville, Osceola and Wheeling will leave Channel 257C2 available for allotment to Boonville. Therefore, petitioner requests the Commission to allot Channel 257C2 to Boonville, Channel 223A to Huntsville, Channel 222A to Osceola and Channel 261A to Wheeling, allowing expanded service at Boonville and a first local service in the other three communities.

6. We believe the public interest would be served by the substitution of Channel 257C2 for Channel 257A at Boonville, Missouri. Channel 257C2 can be allotted to Boonville consistent with the minimum distance spacing requirements at the site specified by the petitioner.[4] In accordance with Section 1.420(g) of the Rules we shall modify the license of Station KDBX-FM to specify operation on Channel 257C2 in lieu of Channel 257A. In response to the counterproposals, we believe it would be in the public interest to allot a channel to each community. Channel 223A can be allotted to Huntsville, Missouri, in compliance with Section 73.207 of the Commission's Rules at the city reference coordinates.[5] Channel 222A can be allotted to Osceola, Missouri, with a site restriction 5.2 kilometers (3.2 miles) east of the community.[6] The site restriction will prevent a conflict with Channel 221A, Station KMOE, Butler, Missouri. Although petitioner proposed the allotment of Channel 261A at Wheeling, we shall instead allot Channel 289A. Channel 261A conflicts with a rule making petition proposing the substitution of Channel 264C1 for Channel 266C1 at Carrollton, Missouri. Channel 289A can be allotted to Wheeling, Missouri, consistent with the spacing requirements at the city reference coordinates.[7]

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 16, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Boonville, Missouri	257C2
Huntsville, Missouri	223A
Osceola, Missouri	222A
Wheeling, Missouri	289A

8. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station

KDBX-FM, Boonville, Missouri, IS MODIFIED to specify operation on Channel 257C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. The window period for filing applications for Channel 223A at Huntsville, Channel 222A at Osceola and Channel 289A at Wheeling will open on **June 19, 1989,** and close on **July 19, 1989.**

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Huntsville, Osceola and Wheeling, Missouri, have been added to the caption.

[2] Public Notice was given on October 7, 1988, Report No. 1752 (RM-6527, Osceola, Missouri, RM-6528, Huntsville, Missouri, and RM-6529, Wheeling, Missouri).

[3] Rice's supplemental comments were received on January 25, 1989, well after the time for filing comments in this proceeding. The comments question site availability for Channel 222A at Osceola. Although the comments have not been accepted, an engineering analysis was prepared with regard to site availability for Channel 222A at Osceola. Our analysis confirms that the site area is limited but meets the minimum distance spacing requirements specified in Section 73.207 of the Commission's Rules. It should be noted that a *Memorandum Opinion and Order* in MM Docket 86-303, was adopted on March 29, 1989, which dismissed a request for the allotment of Channel 221A at Pleasant Hope, Missouri, thereby removing any site constraints that may have existed in the direction of Pleasant Hope and significantly increasing the available site area for Channel 222A at Osceola.

[4] The coordinates for Channel 257C2 at Boonville are 38-46-29 and 92-33-22.

[5] The coordinates for Channel 223A at Huntsville are 39-26-24 and 92-32-42.

[6] The coordinates for Channel 222A at Osceola are 38-02-02 and 93-38-39.

[7] The coordinates for Channel 289A at Wheeling are 39-47-12 and 93-23-07.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HONEYWELL, INC. CSG-89-042-P/L

Application for authority to construct and operate a 2.4-meter Ku-band transmit/receive earth station at Gardena, California to access the Morelos I satellite

CONOCO COMMUNICATIONS, INC. CSG-89-056-ML

Application for authority to modify and operate a 5.1-meter Ku-band earth station (Call Sign 890438) in Houston, Texas for the provision of services between the United States and Mexico via all U.S. domestic satellites and Morelos satellites

INFOSHARE COMMUNICATIONS, INC. CSG-89-057-ML

Application for authority to modify and operate a 2.4-meter Ku-band domestic fixed band satellite earth station at Houston, Texas (Call Sign E890063) for the provision of intracorporate services between the United States and Latin America via all U.S. domestic satellites and the Anik and Morelos systems

E.D.S. SPECTRUM CORPORATION CSG-89-060-ML

For modification of its 4.5-meter, Ku-band domestic fixed earth station (call sign E873929) at Detroit, Michigan for the provision of non-common carrier international communications between the United States and those points to which PAS is authorized to serve

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: April 24, 1989; Released: May 2, 1989

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned applications requesting authority under Title III of the Communications Act of 1934, as amended, to modify existing domestic satellite earth station licenses or to construct new earth station facility to provide satellite transborder services between the United States and Canada, Mexico, Latin America and the Caribbean. The Commission also has under consideration an application for modification of an existing domestic earth station to communicate with the PAS-1 satellite. These applications were placed on the Commission's public notice. No comments were received.

THE APPLICATIONS

2. *Honeywell, Inc. (Honeywell) (File No. CSG-89-042-P/L).* Honeywell requests authority to construct and operate a 2.4-meter Ku-band transmit/receive earth station at its Gardena, California facility that will communicate with Honeywell's Tijuana, Mexico facility via the the Mexican Morelos I satellite. The earth station will be used for private, intracorporate communications.

3. *Conoco Communications, Inc (Conoco) (File No. CSG-89-056-ML).* Conoco seeks authority to use its 5.1-meter Ku-band earth station (Call Sign E890438) in Houston, Texas to provide a private communications link with various of its facilities located in Mexico via all U.S. domestic satellites and the Morelos I and II satellites.

4. *InfoShare Communications, Inc. (Infoshare) (File No. CSG-89-057-ML).* InfoShare is a producer of electronic publishing software whose customers are typically newspapers, educational institutions and trade associations. In the subject application, InfoShare seeks authority to modify its 2.4-meter Ku-band domestic fixed satellite earth station (Call Sign E890063) to provide communications between the United States and Canada and Mexico and Latin America for its customers via all U.S. domestic satellites and the Anik and Morelos satellite systems. InfoShare states that it will provide access to its computers by its customers as well as provide electronic publishing and communications on a non-common carrier basis between compatible computers of its customers.

5. *E. D. S. Spectrum Corporation (EDS) (File No. CSG-89-060-ML).* EDS, a wholly-owned subsidiary of Electronic Data Systems Corporation, which is in turn a wholly-owned subsidiary of General Motors Corporation, requests authority to modify its existing license for a 4.5-meter, Ku-band domestic fixed earth station (Call Sign E873929) at Detroit, Michigan to permit it to access the PAS-1 satellite for private, non-common carrier international communications, not interconnected with the public-switched message networks, between the U.S. and those countries which PAS is authorized to serve. In a supplement to its application filed on March 28, 1989, EDS states that its use of the PAS system will be under a one-year contract for a minimum of 91 hours of occasional use video space segment service (and of incidental data carriers). EDS adds that grant of the requested modi-

fication will permit it to take advantage of the long-term, private, international, non-switched communications services offered via the PAS system.

DISCUSSION

6. In 1981, following consultations with the Department of State, the Commission gave initial approval for use of U.S. domestic satellites for the transmission of certain international telecommunications services to points within the footprint of those satellites.[1] The Commission determined that domestic satellites could be used for these services where INTELSAT is incapable of providing a service or where it would be clearly uneconomical or impractical to use the INTELSAT system for that services. Based on these criteria, the Commission has authorized over 200 applications for transborder service between the United States and Canada, Mexico, Latin America and the Caribbean locations.

7. The subject applications are similar to previous applications granted under the Commission's Transborder policy. The applications involve the modification of two domestic earth station licenses and the construction of one earth station to extend existing or planned domestic networks to provide business services between the United States and Canada and Mexico using U.S. domestic satellites as well as the Anik and Morelos satellites.[2] Under these circumstances, we conclude that a grant of the subject applications is consistent with the Commission's Transborder policy. The Commission has previously recognized that where the extension of existing domestic business networks is involved, use of the INTELSAT system would be both clearly impractical and uneconomical.[3] Specifically, the Commission has noted that maximum efficiency is gained through use of one satellite to link a customer's numerous business locations simultaneously. Use of the INTELSAT system would require the virtual duplication of a domestic network for each customer that wanted to add Canadian or Mexican business locations to its network. In addition, the Commission has found that use of INTELSAT facilities in such circumstances would be an inefficient use of the available radio frequency spectrum.

8. We also find that the application of EDS to utilize Ku-band space segment capacity via the PAS-1 satellite to provide private, non-common carrier service to those points in Europe which PAS has been authorized to serve is consistent with the Commission's *Separate Systems* decision.[4] On October 28, 1988, PAS was authorized to operate the six Ku-band transponders in its PAS-1 satellite for communications between the United states and the United Kingdom, Ireland, the Federal Republic of Germany, Sweden and Luxembourg, subject to certain restrictions.[5] In view of the foregoing, we conclude that the grant of EDS' application is consistent with the Commission's Separate Satellite Systems policy and will serve the public interest.

9. Accordingly, IT IS ORDERED that the applications of Honeywell (File No. CSG-89-042-P/L), Conoco (File No. CSG-89-056-ML) and InfoShare (File No. CSG-89-057-ML). ARE GRANTED and the applicants are authorized to provide the transborder services requested in their applications consistent with Attachments 1 and 2.

10. It is FURTHER ORDERED that Honeywell (File No. CSG-89-042-P/L) is authorized to construct a 2.4-meter Ku-band earth station at Gardena, California communication with its Tijuana, Mexico facility via the Morelos I satellite for the provision of intracorporate communications.

11. It is FURTHER ORDERED that InfoShare is limited to the provision of intra-corporate communications between its offices in Houston, Texas and Canada and Mexico. Any use of its facilities to serve Latin America/Caribbean locations is limited to one-way, receive-only services. InfoShare shall not offer any public common carrier services, consistent with the provisions of Section 310(b), 47 U.S.C. 310(b).

12. It is FURTHER ORDERED that the application of EDS (File No. CSG-89-060-ML) IS GRANTED and EDS is:

a. authorized to access the space segment capacity via the PAS-1 satellite to provide private, non-common carrier services between the United States and the United Kingdom, Ireland, the Federal Republic of Germany, Luxembourg, Sweden and those additional points which the PAS-1 satellite may be authorized in the future to serve upon notice from the Department of State that the United States has fulfilled its obligations to consult with INTELSAT under Article XIV(d);

b. restricted in the operation of the subject earth station communicating with the PAS-1 satellite to the provision of capacity through the sale or long-term lease (of at least one year) of transponder capacity for communications not interconnected with the public-switched message networks (except for emergency restoration service);

c. subject to Commission jurisdiction over the use of all space segment within the PAS system and operation of the proposed earth station to ensure compliance with the restrictions stated; and

d. restricted to operate the proposed earth station in accordance with the parameters summarized and conditions described in Attachment No. 1 to AP-11-10E, "Report by the Board of Governors to the Eleventh Assembly of Parties Pursuant to Article XIV(d) on the PanAmSat Network" (February 1987).

13. This authorization constitutes the final step with respect to the provision of transborder services only insofar as the U.S. regulatory process is concerned. It does not, however, dispense with any requirements that may be imposed by other countries involved.

14. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained.

15. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.15 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

ATTACHMENT 1

U. S. Satellites Consulted Pursuant to Article XIV (d)

Satellites
*FEDEX A
*FEDEX B
GALAXY I
*GALAXY II
GALAXY III
*GALAXY IV
*GALAXY B
GSTAR I
GSTAR II
*GSTAR III
*COMSTAR III
COMSTAR D-4
*COMSAT GEN B
SPACENET I
*SPACENET II
SPACENET III
SATCOM IR
*SATCOM IIR
SATCOM IIIR
SATCOM IV
SATCOM V
SATCOM K-1
*SATCOM K-2
SBS V
SBS I
SBS II
SBS III
**SBS IV
TELSTAR 3A
TELSTAR 302
*TELSTAR 303
CONTEL ASC-I
CONTEL ASC-II
WESTAR IV
WESTAR V
*WESTAR B
*WESTAR (79^0 W)

* Consulted for Latin America/Caribbean services only. Includes receive-only video programming from the U.S. to Mexico.

** Consulted for Canada and Latin America/Caribbean services only.

ATTACHMENT 2

SUMMARY OF INTELSAT CONSULTATION

Country	Service[s]	Satellite [s]
Anguilla	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Antigua and Barbuda	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bahamas	T.V., audio and data receive-only	all satellites listed in Attachment 1
Barbados	T.V. receive-only	all Galaxy, Satcom and Westar satellites listed in Attachment 1
Belize	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bermuda	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
British Virgin Islands	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Canada	occasional pt.-to-pt. and full time video services and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus ANIK B, C1, C2, C3, D1 and D2
Cayman Islands	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Colombia	T.V. receive-only	Galaxy I and III, Satcom IR, IIIR, IV and V, Westar IV, Westar V and Westar (269E)
Costa Rica	T.V. receive-only	all satellites listed in Attachment 1
Dominica	T.V., audio and data receive-only	all satellites listed in Attachment 1
Dominican Republic	T.V., audio and data receive-only	all satellites listed in Attachment 1
El Salvador	T.V. receive-only	all satellites listed in Attachment 1
Grenada	T.V., audio and data receive-only	all satellites listed in Attachment 1
Guatemala	T.V. and audio receive-only	all satellites listed in Attachment 1

Haiti	T.V., audio and data receive-only	all satellites listed in Attachment 1
Honduras	T.V. receive-only	all satellites listed in Attachment 1
Jamaica receive-only	T.V., audio and data (See note 3)	all satellites listed in Attachment 1
Mexico	Full-time and occasional T.V. services, receive-only audio and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus the Morelos I and II satellites
Monsterrat	T.V., and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Netherlands Antilles	T.V. receive-only	Galaxy I, Satcom III-R and IV, Westar IV and V and Comstar D4
Panama	T.V., audio and data receive-only	all satellites listed in Attachment 1
St. Christopher-Nevis	T.V., audio and data receive-only	all satellites listed in Attachment 1
St. Lucia	T.V., audio and data receive-only	all satellites listed in Attachment 1
St. Vincent and the Grenadines	T.V., audio and data receive-only	all satellites listed in Attachment 1
Trinidad and Tobago	T.V. receive-only	all Galaxy, Satcom, Westar and Comstar satellites listed in Attachment 1
Turks & Caicos	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Venezuela	T.V. receive-only	all satellites listed in Attachment 1

Notes

1) With the exception of Mexico and Canada, which were consulted separately, all services (*i.e.* T.V., audio and data receive-only) can be provided to any point over any of the satellites listed in Attachment 1 even though only certain services and satellites were initially requested. This can be accomplished through notifying INTELSAT with no additional consultation required.

2) Attachment 1 contains only those satellites that have been technically consulted with INTELSAT.

3) All services authorized to Latin American/Caribbean locations are receive-only (*i.e.* can be received as a by-product of or incidental to U.S. domestic transmissions).

FOOTNOTES

[1] Transborder Satellite Video Services, 88 FCC 2d 258 (1981).

[2] We also note that the application of InfoShare proposes services to Latin America. However, as indicated in paragraph 11, *infra*, service to Latin American locations is limited to one-way receive-only services consulted under Article XIV(d) of the INTELSAT Agreement.

[3] Satellite Business Systems, 88 FCC 2d 195 (1981).

[4] 100 FCC2d 1046 (1985), *recon.* FCC 86-144, April 17, 1986, *further recon.* 1 FCC Rcd 439 (1986).

[5] *See* 3 FCC Rcd 6474 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Central Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs — AAD 7-1703

MEMORANDUM OPINION AND ORDER

Adopted: April 24, 1989; Released: May 2, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. In the *Joint Cost Order*,[1] the Commission required certain subject carriers, including Central Telephone Company (Centel), on behalf of its operating telephone companies,[2] to file a manual for separating costs of regulated telecommunications services from the costs of nonregulated activities. In response to this requirement, Centel filed a cost allocation manual on August 28, 1987. This manual described Centel's nonregulated activities, listed the activities Centel proposed to treat as incidental activities, and provided information on Centel's affiliate transactions, employee time reporting procedures, and cost apportionment methods.

2. We reviewed this manual in the *Centel Order* [3] and found that certain areas of the manual required clarification or revision. Despite these problem areas, we conditionally approved Centel's manual. We determined that the manual provided adequate assurances against the misallocation of costs and revenues between regulated and nonregulated activities to permit its implementation on January 1, 1988. We required, however, that Centel submit revisions addressing each of the specified problem areas. We stated that these revisions would be subject to public comment and our review, and that we would take all appropriate action, including the prescription of specific apportionment procedures, in the event we disapproved any part of the revised manual.[4]

3. Centel submitted its revisions, which provide additional information regarding the problem areas identified in the *Centel Order*, on December 30, 1988 and February 13, 1989. According to Centel, these revisions address the matters contained in that Order.[5] No party commented on these revisions.

4. After reviewing the contents of Centel's revised manual, we find, subject to certain exceptions, that it is consistent with the Commission's requirements for cost allocation manuals and properly implements the *Centel Order*. Before turning to these exceptions, we wish to emphasize that this Order does not discuss the many areas in which Centel has complied fully with Commission requirements and the *Centel Order*. We also wish to emphasize that the exceptions are very limited in relation to the manual as a whole. Accordingly, we approve Centel's December 30, 1988 and February 13, 1989 revisions, subject to the filing of additional information and revisions specified herein. This filing shall be made no later than June 30, 1989.

II. DISCUSSION

A. Overall Sufficiency of the Manual

5. Under the *Joint Cost Order*, each cost allocation manual must describe the nonregulated activities, incidental activities, affiliate transactions, employee time reporting procedures and cost apportionment methods of the telephone operating companies that will apply it. In the *Centel Order*, we required Centel to provide additional, and in certain instances, corrected information regarding each of these areas. In its revised manual, Centel provides additional information regarding these areas.

B. Nonregulated Activities

6. In the *Centel Order*, we noted that Centel listed twenty-four activities as nonregulated which it states it "engages in to a lesser degree." We required Centel to explain the meaning of the term "lesser degree," and to explain why these activities are not listed as separate nonregulated activities. In its revisions, Centel has deleted the term "lesser degree," has added one more activity, Voice Mail Services, to this list, and has not explained why the other nonregulated activities are not listed separately. We find this response inadequate to satisfy our concerns. Consequently, in its further revisions, we direct Centel to amend its manual by separately defining each of the twenty-five activities.

C. Affiliate Transactions

7. We directed Centel to revise the section on affiliate transactions because it was not clear whether the asset or service rules apply to its transactions. Centel has revised its manual to more clearly define whether a transaction involves the transfer of assets, the provision of services, or both. It indicates that for services provided to a nonregulated affiliate it uses tariff rates, prevailing prices to nonaffiliates, if available, and if neither of these two are available, it charges the affiliate not less than cost. However, it is not clear whether the term "prevailing price" meets the criteria for determining the terms of affiliate transactions because there is no definition of this term in the manual. For transactions involving the provision of a service, we determined in the *NYNEX Compliance Order* [6] that under the affiliate transaction rules, carriers normally must record services provided by nonregulated affiliates at the affiliates' fully distributed costs.[7] We held that the only general exception to this costing methodology "permits the carrier to record an affiliates' services at the market rate 'when the same services are also provided by the affiliate to unaffiliated persons or entities.'"[8] This general exception applies only if the nonregulated affiliate also supplies the same services to nonaffiliate users in a sufficiently large number of cases to establish prevailing company prices.[9] Finally, untariffed services that carriers provide to nonregulated affiliates must also be recorded at the carriers' fully distributed costs unless the carriers provide the same services to nonaffiliated entities in a sufficiently large number of cases to establish a market rate.[10] In its further revisions, Centel must define the term "prevailing price" and must verify that each affiliate

transaction involving the provision of a service that it proposes to provide at market prices meets the above criteria.

8. If the transaction involves a transfer of assets, the carrier should record it at the prevailing price held out to the general public, that is, the prevailing company price. If there is no prevailing company price, asset transfers from the affiliate to the carrier should be recorded at the lower of net book cost or fair market value, while asset transfers from the carrier to the affiliate should be recorded at the higher of net book cost or fair market value. Centel's definition relating to transfer of assets should conform to this definition.

9. Centel's revised manual also added several new affiliates including CenDon. According to Centel, CenDon provides publishing and delivery of directories to each of Centel's operating companies, performs associated directory services, and "makes 'sum certain' payments to the operating units pursuant to the publishing contracts between CenDon and each of the operating units except Central Telephone Company of Texas."[11] In payment for these publishing and delivery services, Centel states that the operating companies exchange services with CenDon which include the provision of: (1) the right to use subscriber listings, (2) documents for data base maintenance, (3) billing and collecting local yellow page and reciprocal advertising, and (4) public service pages.[12] A primary purpose of the cost allocation manual process is to enable carriers to structure their operations in the manner they deem appropriate, while providing adequate safeguards against the misallocation of costs to regulated activities.[13] The method chosen to prevent such allocation is to require carriers to disclose, in their cost allocation manuals, the nature, terms, and frequency of their affiliate transactions in sufficient detail for us to evaluate them. In this case, Centel has not provided sufficient detail as to the terms and frequency of this exchange arrangement. For example, the manual does not make clear whether the payment in service between CenDon and the operating companies is reasonable since there is no basis, either in prevailing prices or in fully allocated costs, to determine if this exchange is equivalent. In addition, Centel does not define the term "sum certain" payments. In its further revisions, Centel must fully explain how it determines the prices or costs for this exchange of services, and it must clearly define the term "sum certain" payment.

III. ACCOUNT - BY - ACCOUNT ANALYSIS

Account 2690 - Intangibles, Account 3500 - Accumulated Amortization - Intangibles, and Account 6564 - Amortization Expense - Intangibles

10. In the *Centel Order*, we directed Centel to develop a more cost causative basis for apportioning Account 2690. Centel has revised this account by establishing two cost pools, "Organization" and "Franchise." The "Organization" pool is apportioned by a general allocator, while the "Franchise" pool is directly assigned to regulated. For Accounts 3500 and 6564, Centel has retained one cost pool for each account, which it assigns directly to regulated activities, and has included in its "Comments" column the statement that, "Amounts in this account correspond solely to limited term franchises in Account 2690."[14] It is not clear to us why Centel has established two cost pools for Account 2690, but maintained only one cost pool each for Accounts 3500 and 6564. Furthermore, the cost pool for Account 3500 and 6564 is directly assigned to regulated. In its further revisions, Centel must either change its allocation methodology or justify why the cost pools in Accounts 3500 and 6564 do not parallel those in Account 2690. In addition, Centel must justify its failure to allocate any costs to nonregulated activities for Accounts 3500 and 6564.

Account 5301 - Uncollectible Revenues - Telecommunications and Account 5302 - Uncollectible Revenues - Other

11. Centel proposes to directly assign uncollectible revenues for Account 5301 to regulated cost pools and for Account 5302 proposes to directly assign uncollectible revenues to regulated and nonregulated cost pools. We are uncertain as to the relationship between Centel's booked uncollectibles and its mix of services, and how it can directly assign uncollectibles to these accounts. We, therefore, require Centel to either clarify how it assigns uncollectible revenue to pools or revise its manual to apportion its uncollectible revenue from its telecommunications operations in proportion to its relative telecommunications revenue and its other uncollectible revenue in proportion to its relative non-telecommunications revenue.

Account 6711 - Executive Expense and Account 6712 - Executive Planning Expense

12. Centel's initial manual proposed to apportion costs in these accounts on the basis of the general allocator. We required that it use a more cost causative approach. For Account 6711, Centel's revised manual establishes three cost pools, "Human Resources/Personnel Officers," "Legal Officers," and "All Other." The former pool is directly attributed using the ratio of nonregulated wages and salaries to total wages and salaries, the middle pool is directly attributable using the ratio of nonregulated amounts in Account 6725 (Legal) to the total amount in this account, and the latter pool is apportioned using the general allocator. For Account 6712, Centel has made no changes to the account, and it has offered no explanation for retaining the general allocator. In addition, Centel requests that the revisions in Account 6711 be made effective January 1, 1989 and not retroactive to January 1, 1988.[15] We find that we cannot approve Centel's revisions to Account 6711, and we find no reason why Centel should retain the use of the general allocator for Account 6712. We believe that many functions associated with Centel's corporate level and planning offices are reasonably susceptible to apportionment methods that are more accurate than what Centel has proposed. We also believe that, with reasonable effort, Centel can associate many of its executive and planning expenses with regulated activities, with nonregulated activities, or with many of the organizational units within Centel's overall communications enterprise.[16] Accordingly, we require Centel to amend its manual to provide new methods for apportioning Accounts 6711 and 6712. To the extent the new methods do not include either dedicated regulated and dedicated nonregulated cost pools within each of these accounts or separate cost pools for the various organizational units within Centel's overall communications organization, Centel must justify in detail the method it proposes.[17] We do, however, grant Centel's request for a waiver from the requirement that the revised procedures be made retroactive to January 1, 1988. In this instance,

we are sympathetic to Centel's position that the procedures which generate the data underlying the cost pool apportionment basis were developed after the *Centel Order* was released. In addition, we are also aware that procedures will have to be revised in order for Centel to comply with the requirments set forth in this order.

Account 6724 - Legal Expenses

13. Centel requests a waiver of the retroactivity requirement to January 1, 1988 for this account because it has revised its basis for apportionment, and it reasons that legal expenses will affect the allocation of the revised executive expenses.[18] For the reasons indicated above, we grant this request.

Account 6726 - Procurement Expense

14. The *Centel Order* directed Centel to use a more direct method for apportioning expenses in this account rather than using the general allocator. Centel's revisions include two cost pools, "Centralized Procurement Services," which is indirectly attributable, and "Field Purchasing Coordinators' Salaries and Expenses," which is apportioned using the general allocator. Centel has not defined the term "Field Purchasing Coordinator," and it has provided no reason for using the general allocator. We, therefore, do not believe that the general allocator is justified in this situation. In its further revisions, we require that Centel define the term "Field Purchasing Coordinator" and require that a more cost causative allocator be used.

IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that the December 30, 1988 and February 13, 1989 revisions to Centel's Cost Allocation Manual ARE APPROVED, subject to the conditions stated in this Order.

16. IT IS FURTHER ORDERED that the revisions required herein shall be submitted no later than **June 30, 1989.**

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Separation of costs of regulated telephone service from costs of nonregulated activities, *Report and Order*, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on reconsideration*, 2 FCC Rcd 6283 (1987) (*Order on Reconsideration*), *modified on further reconsideration*, 3 FCC Rcd 6701 (1988) (*Further Order on Reconsideration*), *petition for review pending*, Southwestern Bell Corp. v. FCC, D.C. Circuit No. 87-1764 (filed December 14, 1987).

[2] The Centel Tier 1 operating telephone companies are Central Telephone Company - Nevada and Central Telephone Company of Florida.

[3] Central Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 7126 (1988) (*Centel Order*).

[4] *Id.* at 7126, paras. 2-3; *id.* at 7130, paras. 35-36.

[5] Centel Revised Manual, Cover Letters, dated December 30, 1988 and February 13, 1989.

[6] NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 5976 (1988) (*NYNEX Compliance Order*).

[7] *Id.* at 5980, para. 20.

[8] *Id., quoting* 47 C.F.R. §32.27(d).

[9] U S West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 195, 199, paras. 33-34 (1988) *U S West Order*).

[10] *Id.* at 199, para. 33.

[11] Centel Revised Manual at page VII-3, February 13, 1989.

[12] *Id.*

[13] *See e.g.,* Amendment of Sections 64.702 of the Commissions's Rules and Regulations, 104 FCC 2d 958, 1074-75 (1986) *(Computer III Phase I Order), recon.,* 2 FCC 2d Rcd 3035 (1987), *further recon.,* 3 FCC 1135 (1988), *petitions for review pending,* People of the State of California v. FCC, D.C. Circuit No. 87-7230 (filed May 28, 1987).

[14] Centel Revised Manual, pages III-59 and III-109, December 30, 1988.

[15] Centel Revised Manual, Cover Letter, dated February 13, 1989.

[16] For instance, Centel might create a cost pool with Account 6711 for executive support of marketing operations. This cost pool could be apportioned in proportion to the wages and salaries of Centel's marketing employees.

[17] *Bell Atlantic Compliance Order,* 3 FCC Rcd at 506, para. 87; *NYNEX Compliance Order* at 5983-84, paras. 50-51.

[18] Centel Revised Manual, Cover Letter, dated February 13, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-46

In the Matter of

Policies to Encourage Interference Reduction between AM Broadcast Stations

ORDER GRANTING MOTION FOR EXTENSION OF TIME FOR FILING COMMENTS

Adopted: April 25, 1989; Released: May 2, 1989

By the Chief, Mass Media Bureau:

1. On March 17, 1989, the Commission released a *Notice of Proposed Rule Making* (*Notice*) in the captioned matter.[1] In this *Notice*, public comment is invited on a proposed formal procedure by which AM licensees may reduce interstation interference, and on certain changes in the AM processing rules that would facilitate such a procedure. Comments on the proposals were to be filed on or before May 8, 1989, and replies on or before May 23, 1989. On April 20, 1989, the National Association of Broadcasters ("NAB") filed a motion requesting that the comment period be extended by 30 days.

2. In support of this request, NAB states that an extension of time would allow it and other parties time to fully evaluate the issues presented in the *Notice*. In this connection, NAB notes that its 67th Annual Convention and International Exposition and 43rd Annual Broadcast Engineering Conference ("Convention") is being held from April 28 through May 2, 1989, and that this Convention will require the full-time participation of its legal staff between April 27 and May 4, 1989. NAB asserts that the May 8, 1989 comment deadline is inadequate for it to prepare comments in this proceeding.

3. NAB also argues that the Convention will provide interested parties with an invaluable opportunity to discuss the matters presented in the *Notice*. Allowing these parties additional time to prepare comments after the Convention will thus result in providing to the Commission a fuller record upon which to base a decision.

4. It is the policy of the Commission that extensions of time in rule making proceedings shall not be routinely granted.[2] However, in this case the extension appears to be justified. We believe that the comments of NAB, which represents a major portion of the broadcast industry,[3] will be particularly valuable to us in reaching an appropriate technical decision to further the public interest. Allowing additional time for discussion among the interested parties will enhance the value of their expected filings. Good cause having been shown, we will grant the requested 30 day extension.

5. Accordingly, IT IS ORDERED That the Motion for Extension of Time submitted by the National Association of Broadcasters IS GRANTED and that the dates for filing comments and replies ARE EXTENDED to **June 7, 1989** and **June 30, 1989,** respectively.

6. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, 1.45 and 1.46 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

FOOTNOTES

[1] *See Notice of Proposed Rule Making* in MM Docket No. 89-46, FCC 89-71, 54 FR 11972, March 23, 1989.

[2] *See* §1.46 of the Commission's Rules, 47 CFR 1.46.

[3] NAB is a non-profit incorporated association of radio and television broadcast stations and networks, whose membership includes more than 5,000 radio stations, 970 television stations and the major commercial networks.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEW YORK TELEPHONE COMPANY — File No. ENF-88-13

Apparent Liability for Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: April 25, 1989; Released: May 3, 1989

By the Chief, Common Carrier Bureau:

1. On October 20, 1988, the Common Carrier Bureau (Bureau) released a Notice of Apparent Liability *(Notice)* against New York Telephone Company (NYT), 4 FCC Rcd 1421 (1988). In the *Notice*, NYT was informed of its apparent liability for forfeitures of $8,000 for its violations of Commission orders regarding the detariffing of installation and maintenance of inside wiring.[1] The *Notice* was based on the record before the Bureau on the date of issuance.

2. First, the *Notice* indicated that NYT was subject to apparent forfeiture liability in the amount of $4,000 pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), for NYT's tariffs and practices which prevented customers from removing or rearranging inside wiring and for disabling inside wire when customers choose to install their own wiring. Secondly, an apparent forfeiture of $4,000 under Section 503(b) was proposed on the ground that NYT's tariffs and practices have the effect of "coercing its customers to purchase company-inside wiring." *Notice* at para. 10. NYT was directed to pay the forfeitures or file a response showing why the forfeitures should not be imposed or why they should be reduced within thirty days. *Notice* at para. 13. In its response, NYT requests us to reconsider our imposition of the forfeitures. As discussed in greater detail below, we believe the forfeiture order accurately expressed the intent of the Commission in the language of the inside wire detariffing orders but, for reasons made clear by the present record, we have determined not to impose the forfeitures.

3. In support of its request, NYT contends that its inside wire maintenance practices are consistent with the orders of the Commission. NYT argues that it reasonably and in good faith interpreted the language in those Commission orders and implemented its policies based on that good faith interpretation. NYT also points out that since the release of the *Notice*, NYT has engaged in negotiations with the Bureau to produce a fair and expeditious resolution of the above-captioned proceeding in a manner that would serve the public interest. In a letter received by Bureau staff on January 18, 1989 from NYT representative Ronald H. Sirch, NYT states it will implement changes to its practices on a prospective basis to coincide with the Bureau's interpretation of the Commission's orders, as expressed in the *Notice*.

BACKGROUND

4. In the *Second Report and Order*, the Commission determined, *inter alia*, that installation of simple inside wiring and the maintenance of all inside wiring would be preemptively detariffed as of January 1, 1987. *Id.* at para. 43. In the *Inside Wiring Reconsideration Order*, the Commission decided that carriers should be prohibited from using claims of ownership of inside wiring "as a basis for restricting the removal, replacement, rearrangement or maintenance of inside wiring." *Id.* at para. 35. Further, the Commission precluded telephone companies from requiring that such wiring be purchased. *Id.* at para. 35. However, the Commission deferred the effective date in the State of New York until January 1, 1990, only for preemptive detariffing of inside wiring maintenance services to avoid subjecting New York consumers to abrupt and substantial increases in intrastate service rates. *Id.* at para. 20. The Commission's deferral of its detariffing requirements in New York affected only the method by which NYT and other New York carriers would provide inside wire maintenance service. It did not affect the *Inside Wiring Reconsideration Order's* mandate that customers could remove, replace, or rearrange a telephone company's inside wire.

5. Evidence in the record existing at the time of the release of the *Notice*, including NYT tariffs, NYT training and operations manuals and other NYT documents submitted, indicated that NYT's actual policies and practices limited customers' rights to install their own inside wiring or to modify and rearrange the company's inside wiring. In correspondence to the Commission dated June 16, 1988, NYT stated that:

> . . . customers of New York Telephone may not remove, replace, or rearrange Company-installed inside wiring.
>
> . . . Under PSC Tariff No. 900, B.4.a, customers of New York Telephone must pay the Company maintenance and monthly charges for inside wire installed by the Company. The charges will apply *unless the Company removes the wire or the customer purchases it.* These are the terms and conditions under which the Company charges for inside wire maintenance in New York State. (Emphasis added.)[2]

6. The *Notice* in this proceeding was issued, therefore, because of NYT's apparent repeated violations of Commission policy and orders relating to the detariffing of inside wiring in that it did not permit customers' removal or rearrangement of inside wire, disabled NYT inside wire when customers chose to install their own wiring and implicitly coerced customers to purchase company-owned inside wire. Moreover, the *Notice* stated that the record, as it then existed, indicated "NYT's tariff regulations, which expressly require the disabling or removal of Company-provided premises wiring, have antedated and not been changed since the effective date of the deregulation program." *Notice* at 5, para. 10.

7. In its response to the *Notice*, NYT states that its inside wiring practices comply with the language of the *Inside Wiring Reconsideration Order*, which specifically held: "[W]e will defer the effectiveness of our preemption decision for inside wiring maintenance services in the State of New York until January 1, 1990, to permit the

NYDPS to devise and implement an orderly transition to rates that are more closely aligned with costs." *Id.* at para. 20. However, as explained above, our *Notice* indicates that what the Commission deferred was merely the means by which the price for inside wiring maintenance is determined; that is, until that date the price of maintenance service will continue to be set by state tariff.

8. Contrary to our conclusion in the *Notice*, NYT argues that nothing in the broad language of the *Inside Wiring Reconsideration Order* supports the view that the deferral only allowed the State of New York to set the price, but not the terms and conditions, for inside wiring maintenance service. To support its position, NYT relies upon a determination made by the Informal Complaints Branch of the Bureau's Enforcement Division to buttress its broad interpretation of the scope of the deferral of preemption granted to New York in the *Inside Wiring Reconsideration Order*. In early 1987, Carl Oppedahl filed an informal complaint with the Commission concerning, *inter alia*, the issue of deferring preemption of New York State's regulation of inside wire maintenance services.[3] In response to the informal complaint, the Informal Complaints Branch of the Bureau's Enforcement Division issued a letter disposing of the complaint and further stated:

> Because this Commission deferred its preemption of state regulation of inside wiring maintenance services for the State of New York, the NYDPS [NYPSC][4] can allow NYT and other local exchange carriers operating in that state to require customers to subscribe to the carriers' inside wiring maintenance plans. . . . Since NYDPS will be responsible, until January 1, 1990, for determining the terms under which NYT can offer inside wiring maintenance services, any complaint regarding those services should be addressed to that Commission.[5]

NYT contends that, in disposing of Oppedahl's informal complaint on the ground that NYDPS will be responsible, until January 1, 1990, for determining "the terms under which NYT can offer inside wiring maintenance services", the Bureau removed all doubt that the State of New York continues to have authority to fully regulate inside wiring maintenance in New York. That overall authority, NYT asserts, includes the power to set not only the price for inside wire maintenance but the terms and conditions related thereto. NYT urges that both the language of the *Inside Wiring Reconsideration Order* and the Bureau's written reply to Oppedahl's informal complaint establishes that no part of NYT's wire maintenance tariffs, related policies or practices had been preempted during the deferral period, including NYT's objectionable practices as stated in the *Notice*.

DISCUSSION

9. Initially, we find that NYT's interpretation of the Commission's orders is at variance with the language and intent of the *Inside Wiring* orders. As stated in our *Notice*, the Commission's *Inside Wiring Reconsideration Order* instructs all carriers not to interfere with the customer's right to remove, replace or rearrange any company-installed or maintained inside wiring. Nor do we agree with NYT's assessment of the meaning behind that order's deferral language. While the *Inside Wiring Reconsideration Order* generally stated that we would defer our preemption decision for inside wiring maintenance services in New York "to permit the NYDPS to devise and implement an orderly transition to rates that are more closely aligned with costs" (*Id.* at para. 20), this language in the order was not intended to confer upon the NYPSC, or NYT, unlimited authority to devise tariff regulations or practices in contravention of Commission policy and orders. The deferral for New York State was limited by language in the *Inside Wiring Reconsideration Order* which not only required the protection of consumers where a telephone company asserts claims of ownership. (*Id.* at para. 4), but also prohibited a telephone company from restricting a customer's right to "the removal, replacement, rearrangement or maintenance of inside wire." (*Id.* at para. 35.)

10. While we cannot concur, therefore, in NYT's view that the Commission's deferral allowed the NYPSC to set any and all terms and conditions pertaining to inside wiring maintenance until January 1, 1990, we conclude that under the circumstances such a misinterpretation was not entirely without basis. As stated above, NYT relied upon the general language in the *Inside Wiring Reconsideration Order* to support its belief that the NYPSC had authority to fully regulate inside wiring maintenance service during the period of deferral.[6] We believe this language should have been interpreted more restrictively. However, we recognize the possibility that it could have been reasonably interpreted in the way relied on by NYT, particularly when viewed along with the response of the Bureau's Informal Complaints Branch which NYT has apparently construed as a general policy statement rather than a specific response to the underlying factual circumstances of a single complaint.[7] Given the totality of these circumstances, we do not believe it is appropriate to find that NYT willfully and unreasonably interpreted Commission policy relating to the detariffing and deferral of inside wire maintenance services, as alleged in the *Notice*.[8]

11. As indicated above, we note that NYT has voluntarily agreed to prospectively change aspects of its tariffs and practices to make them consistent with the Bureau's clarification underlying the Commission's deferral, as set forth in the *Notice* and by our discussion herein. NYT has indicated in meetings and correspondence with the Bureau that some of the changes in NYT's inside wire practices have already been implemented since the release of the *Notice*.[9] The Bureau and NYT have therefore reached an agreement, the terms and conditions of which are specifically contained in the attached Appendix, which will assure NYT's compliance with Commission policies and orders as we interpret them. In summary, NYT has agreed to promptly file a proposal with the NYPSC to modify its tariffs so that customers may "rearrange and modify" NYT-installed wire located on the customers' premises. Moreover, NYT will not automatically disable inside wire when a SNI is installed. Instead, NYT-installed wire will be disconnected, or turned back and cut at the SNI, only when customers advise NYT that they no longer want to use *any* NYT-installed wire. That is, NYT-wiring shall not be removed or rendered useless unless specifically authorized by the customer. In addition, NYT has agreed to promptly issue internal guidelines and develop a comprehensive training program for NYT representatives which will ensure implementation of the proposed changes in NYT practices and tariffs. As a further indication of their good faith, NYT has decided to implement a

comprehensive customer notification program in connection with its inside wire maintenance service which will fully inform all NYT customers of their options when inside wire maintenance is detariffed in New York State on January 1, 1990. This program will ensure that only those persons who affirmatively advise NYT that they wish to subscribe to NYT's inside wire maintenance program will receive that service. Thus, only those customers who actually want the company's maintenance and so advise the company, will actually be paying for that service.

12. Section 504(b) of the Act provides that forfeitures imposed under Section 503(b) are subject to remission or mitigation by the Commission. We have thoroughly reviewed the record in this proceeding and considered all mitigating facts and circumstances, particularly the measures proposed by NYT to modify its inside wire practices. We therefore conclude that imposition of forfeiture penalties is unwarranted. At the same time, we require NYT in the future to comply strictly with Commission orders and policies in the detariffing of inside wiring as set forth in the *Notice*. Should we discover any future violations by NYT of the Commission's *Inside Wiring* orders, we shall take appropriate remedial action.

13. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Rules, 47 C.F.R. § 0.291, that our findings that NYT violated Commission Orders regarding the Detariffing of Installation and Maintenance of Inside Wiring ARE WITHDRAWN.

14. IT IS FURTHER ORDERED, pursuant to Section 504(b) of the Communications Act, 47 U.S.C. § 504(b), that the request of NYT for the recision of the imposition of the forfeitures against it IS GRANTED.

15. IT IS FURTHER ORDERED that NYT shall abide by the terms and conditions set forth in the Appendix to assure compliance with the Commission's inside wiring orders.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

APPENDIX

The following is a list of NYT's practices to be prospectively implemented:

1. *Sale of Wire* - Within 30 days of the release of this Order, NYT agrees to file a proposal with the State of New York Public Service Commission (PSC) to withdraw Tariff P.S.C. No. 900 -Telephone Section 2 Paragraph K, "Sale of In-Place Residence Simple Inside Wire". Pending approval of that filing, NYT agrees to continue its current practice of advising customers that in most circumstances it is not economically practical to purchase embedded wire from NYT.

2. *Rearrangements* - Within 30 days of the release of this Order, NYT agrees to file a proposal with the PSC to modify Tariff P.S.C. No. 900 -Telephone, Section 15, Paragraph A, so that customers may rearrange and modify NYT-installed inside wire. NYT will advise customers they are responsible for any out-of-service condition that may result from their activity. In doing so, NYT will be careful not to discourage customers from rearranging wiring themselves, if they wish to do so.

3. *Disabling* - NYT will continue its current practice of not automatically disabling inside wire when a Standard Network Interface (SNI) is installed within the customer's premises. NYT-installed wire will be disconnected at the SNI when customers advise NYT that they no longer want to use any NYT-installed wire. On the other hand, wiring will be left in place and the customer will be billed accordingly when customers indicate that they desire to continue to use NYT-installed wire. In addition, NYT will modify its practices so that when a Demarcation Point Arrangement is chosen by the customer, NYT will no longer remove excess wire beyond the DPA. Wiring will be left in place and customers will be billed for wire actually used.

4. *Customer Notification* - All the changes discussed above will be highlighted in future customer notifications regarding inside wire.

5. *Representative Training* - NYT agrees to develop and implement a comprehensive training program and train its representatives to assure full compliance with the Commission's orders on this subject matter.

FOOTNOTES

[1] Detariffing the Installation and Maintenance of Inside Wiring, Docket No. 79-105, 51 Fed. Reg. 8498 (1986) (hereinafter *Second Report and Order), recon. denied in pertinent part,* 1 FCC Rcd 1190 (1986) (hereinafter *Inside Wiring Reconsideration Order), further recon.*, 3 FCC Rcd 1719 (1988) (*Second Reconsideration Order), appeal docketed sub nom.* NARUC v. FCC, No. 86-1678 (D.C. Cir. Dec. 11, 1986).

[2] Letter from Edward C. Small to Martin Mim Mack (June 16, 1988), File No. IC-88-04079. *See also Notice* at 3, 4, paras. 5, 6; letter from Carl Oppedahl to Commission (April 12, 1988), File No. IC-88-04079.

[3] File No. IC-87-01896 (January 30, 1987).

[4] New York Public Service Commission.

[5] Letter from Informal Complaints Branch, FCC, to Carl Oppedahl (April 23, 1987), File No. IC-87-01896.

[6] *See* para. 9, *supra*.

[7] *See* paras. 8 and 9, *supra*.

[8] *See, e.g.*, United States v. Rust Communications Group, Inc., 425 F. Supp. 1029 (E.D. Va. 1976).

[9] For example, in the letter received by Bureau staff on January 18, 1989 from NYT, NYT represents that it will continue its revised practice of not cutting inside wire when a standard network interface (SNI) is installed within the customer's premises if the customer wishes to continue using NYT-installed wire.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Deferral of Rate of Return Represcription Filings Pursuant to Section 65.102(c) of the Rules — AAD 8-1930

MEMORANDUM OPINION AND ORDER

Adopted: April 25, 1989; Released: May 3, 1989

By the Chief, Common Carrier Bureau:

INTRODUCTION

1. Section 65.102 of the Commission's Rules[1] establishes procedures certain carriers must follow when filing rate of return submissions with the Commission. Subsection (c) of that rule governs the timing by which carriers must file their submissions. In the *Ameritech/BellSouth Order*,[2] released December 7, 1988, we deferred the next scheduled filing date for rate of return submissions under Section 65.102(c) until June 30, 1989, for all local exchange carriers (LECs) and AT&T. By this *Order*, we defer the date on which subject carriers must file rate of return submissions pursuant to Section 65.102(c) until ninety days after the Commission releases a *Report and Order* in CC Docket No. 87-463 addressing this matter.[3]

BACKGROUND

2. The Commission is currently conducting a thorough examination of its Part 65 rules[4] in CC Docket No. 87-463. The Part 65 rules comprise the Commission's regulatory framework for prescribing authorized interstate rates of return for the LECs. The Commission initiated this examination of Part 65 to refine the procedures and methodologies for setting interstate rates of return in light of experience with the initial represcription under Part 65 in 1986,[5] and changes since that time.[6] Our decision in the *Ameritech/BellSouth Order* to defer the filing date for rate of return submissions until June 30, 1989, acknowledged the ongoing efforts to complete a refinement of the Part 65 rules, and was intended to allow carriers to file their submissions according to a revised, improved rate of return represcription scheme.[7]

3. Concurrent with this ongoing examination of Part 65, the Commission has been exploring an alternative approach to traditional rate of return regulation in CC Docket No. 87-313.[8] That proceeding considers a framework for incentive regulation, or price caps, which limits the prices carriers may charge the public, rather than the current rate of return approach which regulates carriers' profits. On March 16, 1989, the Commission adopted incentive regulation as a mandatory replacement for rate of return regulation for AT&T beginning July 1, 1989.[9] The *Price Cap Order and Second Further Notice* also proposes replacing rate of return regulation with a mandatory incentive-based approach for certain local exchange carriers in 1990, and seeks comment on what modifications are necessary to adapt price caps to local exchange carriers.[10]

4. Although the Commission may decide it needs to conduct a further review of the Part 65 rules in light of the impact of incentive regulation, formulas for computing interstate rates of return will still remain relevant and will continue to be an important part of the Commission's regulatory scheme. Smaller local exchange carriers will not be subject to mandatory incentive regulation, and will have the opportunity to choose between the new incentive-based approach and traditional rate of return regulation. Further, the authorized rate of return will remain a necessary component in computing other calculations that are unaffected by incentive regulation.[11] Thus, incentive regulation will not eliminate the need for a framework for prescribing carriers' authorized interstate rates of return.

DISCUSSION

5. Due to the additional considerations raised by the Commission's adoption of incentive regulation, it will not be possible for the Commission to complete the proceedings in CC Docket 87-463 in time for carriers to comply with the June 30, 1989, filing deadline established by the *Ameritech/BellSouth Order*. Accordingly, it is necessary to defer the impending filing date for carriers' submissions. This approach will enable the Commission to address the issues raised in the *Notice* in CC Docket No. 87-463 and to consider the need for modifications to the Part 65 rules to reflect the impact of incentive regulation upon the Commission's current rate of return regime.[12] Therefore, we defer the date for filing rate of return submissions under Section 65.102(c) until ninety days after the Commission releases a *Report and Order* in CC Docket No. 87-463. The ninety day buffer will afford carriers sufficient time to incorporate changes to the Part 65 rules into their next rate of return submissions.[13]

ORDERING CLAUSE

6. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that the filing date for carriers to submit their direct cases for purposes of rate of return represcription in accordance with Section 65.102(c) of the Commission's Rules, 47 C.F.R. § 65.102(c) (1987), IS DEFERRED until ninety days after the Commission releases a *Report and Order* in CC Docket No. 87-463.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] 47 C.F.R. § 65.102 (1987).

[2] Deferral of Rate of Return Reprecription Filings Pursuant to Section 65.102(c) of the Rules, 3 FCC Record 7220 (1988) (*Ameritech/BellSouth Order*).

[3] *See* Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers, *Notice of Proposed Rule Making*, CC Docket No. 87-463, 2 FCC Rcd 6491 (1987) (*Notice*).

[4] 47 C.F.R. §§ 65.1 *et seq.* (1987).

[5] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase III, FCC 86-354, 51 Fed. Reg. 32920 (September 17, 1986), *recon. denied*, 2 FCC Rcd 5636 (1987).

[6] *See Notice*, 2 FCC Rcd at 6491, para. 3.

[7] *Ameritech/BellSouth Order*, 3 FCC Rcd at 7222, paras. 22-23.

[8] *See* Policy and Rules Concerning Rates for Dominant Carriers, *Further Notice of Proposed Rule Making*, 3 FCC Rcd 3195 (1988).

[9] Policy and Rules Concerning Rates for Dominant Carriers, *Report and Order and Second Further Notice of Proposed Rulemaking*, CC Docket No. 87-313, FCC 89-91 (released April 17, 1989) *(Price Cap Order and Second Further Notice)*.

[10] *Id.* at 5, paras. 4-5.

[11] *Id.* at 404, para. 837.

[12] *Id.* at 347 n.1492.

[13] Although we defer the filing date pending release of a Commission *Report and Order* in CC Docket No. 87-463 addressing revisions to the Part 65 rules, we emphasize that this deferral remains subject to any future Commission action regarding the schedule for filing carrier rate of return submissions. The Commission may choose to issue an order addressing the filing schedule prior to release of a final *Report and Order* in CC Docket No. 87-463. Moreover, we note that the Commission previously extended the current prescription periods for AT&T and the LECs to include 1989. *See* Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers, 3 FCC Rcd 1697, 1698, paras. 12, 15 (1988). We do not decide in this *Order* whether the current prescription period should be extended beyond 1989. The continued viability of the currently authorized rate of return, the need for any extension of the current prescription period, and the possibility of prescribing revised, temporary rates of return until the Commission completes the Part 65 rule modifications will be addressed in a subsequent order. *See Ameritech/BellSouth Order*, 3 FCC Rcd at 7220, para. 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS Transmittal No. 1485
Revisions to Tariff F.C.C. No. 12

MEMORANDUM OPINION AND ORDER

Adopted: April 19, 1989; Released: April 19, 1989

By the Chief, Common Carrier Bureau:

1. On January 13, 1989, American Telephone and Telegraph Company (AT&T) filed Transmittal No. 1485, proposing the addition of 1.5 megabits per second (Mbps) Data Transmission Capabilities (DTCs) to Virtual Telecommunications Network Service (VTNS), Option I (VTNS I).[1] On January 30, 1989, MCI Communications Corporation (MCI) filed a petition to suspend and investigate. AT&T filed its reply on February 9, 1989.

2. AT&T states that this filing is the result of the customer's request for network reconfigurations and the provision of high capacity network elements. AT&T Description and Justification (D&J) at 1. The addition of these high capacity DTCs is necessary, according to AT&T, to meet the unanticipated needs of the VTNS I customer. The proposed tariff revisions also increase the basic and minimum monthly charges for VTNS I to recover the cost of these additions. *Id.* at 1-2. AT&T describes the basis for the revised rates, and states that the other terms and conditions are consistent with the provision of 1.5 Mbps DTCs to other VTNS customers. *Id.* at 2-4.

3. AT&T provides a demand and revenue analysis projecting a revenue increase resulting from the revision. AT&T provides supporting financial data, as required by Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, asserting that this filing will result in an increase in the private line and total interstate service categories, and a decrease in the switched services category, on a fully distributed cost basis. *Id.* at 4-7 & Appendices 1-3. Finally, AT&T provides revenue and cost analyses asserting that VTNS I revenues will exceed costs in years two and four with the proposed tariff revisions. *Id.* at 7-9 & Tables B & C.

4. MCI avers that AT&T's filing should be suspended pending the conclusion of the Tariff 12 investigation. MCI asserts that AT&T's Tariff 12 offerings are simply a rate structure designed to obscure rate discounts of functionally equivalent AT&T offerings to specific customers. MCI Reply 1-3, 6-7. MCI calculates comparative rates for 1.5 Mbps service under the proposed tariff revisions and AT&T's ACCUNET service, and concludes that the resulting preference to the VTNS I customer is unreasonable and therefore violates Sections 201(b) and 202(a) of the Communications Act, 47 U.S.C. §§ 201(b), 202(a). *Id.* at 4 & Appendix A. MCI alleges that the supporting financial information filed by AT&T is insufficient. *Id.* at 4-5.

5. AT&T replies that MCI fails to make the necessary showing for suspension, and notes that the allegations made by MCI have previously been found insufficient for suspension. AT&T Reply at 2, 6. AT&T avers that MCI's rate comparisons are invalid because VTNS is not "like" the other service offerings of AT&T, and that MCI's calculations fail to incorporate the cost savings resulting from the integration of services under VTNS. *Id.* at 2-4. AT&T asserts that VTNS I will recover all relevant costs and produce positive net revenues. AT&T further asserts that a cost of service study is not required, contrary to MCI's assertion. *Id.* at 4-5.

6. The Common Carrier Bureau has reviewed Transmittal No. 1485 and the pleadings filed by MCI and by AT&T. We note that the Commission recently determined that various transmittals proposing tariff revisions to AT&T's Tariff F.C.C. No. 12, which were subject to investigation in CC Docket No. 87-568, are unlawful, and ordered AT&T to withdraw or revise those offerings in accordance with the provisions of the *Tariff 12 Order*.[2] Accordingly, we determine that since the instant transmittal is a revision to tariffs determined to be unlawful in the *Tariff 12 Order* (and these proposed tariff revisions have the same characteristics which the Commission found unreasonable in that Order), the revisions before us are patently unlawful and are rejected.

7. On February 24, 1989, AT&T filed Transmittal No. 1526, proposing certain revisions and clarifications related to the instant transmittal. In light of the Commission's determination in the *Tariff 12 Order*, and our rejection of Transmittal No. 1485, we note that the revisions proposed in Transmittal No. 1526 are also unlawful. Accordingly, AT&T must withdraw that transmittal.

8. Accordingly, IT IS ORDERED that the petition for suspension and investigation of American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 1485, filed by MCI Telecommunications Corporation, IS GRANTED to the extent indicated herein, and the tariff IS REJECTED.

9. IT IS FURTHER ORDERED that American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 1526, IS UNLAWFUL.

10. IT IS FURTHER ORDERED that American Telephone and Telegraph Company SHALL FILE tariff revisions not later than April 24, 1989, to become effective on one day's notice, in order to remove rejected and unlawful material from its tariff. For this purpose, Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived and Special Permission No. 89-298 is assigned.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] VTNS I was originally proposed by AT&T in Transmittal Nos. 1018 and 1102, which took effect subject to investigation. AT&T Communications, Transmittal Nos. 1018 and 1102, CC Docket No. 87-568, Memorandum Opinion and Order, 3 FCC Rcd 995 (1988).

[2] AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568, Memorandum Opinion and Order, FCC 89-116, released Apr. 18, 1989 (*Tariff 12 Order)* at paras. 59, 72, and 74.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

SOUTHWESTERN BELL TELEPHONE COMPANY
Revisions to Tariff F.C.C. No. 68

Transmittal Nos. 1777, 1778, 1781, 1785, 1787, 1792, 1795, 1799, and 1801

ORDER

Adopted: April 25, 1989; Released: April 26, 1989

By the Chief, Common Carrier Bureau:

1. By the above-referenced transmittals, which were filed between February 13, 1989, and April 10, 1989,[1] Southwestern Bell Telephone Company (Southwestern) has proposed revisions to its access service tariff for rates and charges for Special Access Individual Case Basis (ICB) High Capacity offerings.

2. On April 7, 1989, Southwestern filed an application[2] for special permission in which it requests waiver of Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, to (1) advance the effective date of some of the proposed revisions, which are not available under the new MegaLink Custom tariff and are not included under the investigation in Docket 88-136;[3] (2) allow modifications to certain provisions that have not been in effect for 30 days; and (3) withdraw certain ICB cases that are now provisioned under the MegaLink Custom section of Tariff 68, which became effective April 1, 1989.

3. On April 18, 1989, Teleport Communications Group (TCG) filed a petition to suspend and investigate the revisions filed under Tr. No. 1795. That transmittal contains two ICB cases, an offering of three 45 Mbps services, with circuit protection, to American Airlines, and one 1.2 Gbps service, with protection, to West Texas Microwave. Under both cases, the customer provides the optical to electrical conversion equipment on its premises. TCG argues that Southwestern does not explain why the American Airlines service arrangement is not subject to its generalized DS3 tariff, which became effective April 1, 1989. In addition, TCG asserts, the cost support data for both services do not give either the Commission or interested parties sufficient information to assess whether the proposed rates are cost-justified.[4] TCG therefore requests that we suspend and investigate Tr. No. 1795.

4. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of local exchange carriers' (LEC) proposed ICB rates designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings.[5] The remaining offerings proposed in Southwestern's various transmittals raise the same issues as those transmittals subject to our *Designation Order*. Therefore, the transmittals will be subject to the outcome of that investigation. We agree with TCG that the three 45 Mbps services to be provided to American Airlines must be made subject to the investigation in Docket 88-136. We also grant Southwestern special permission to advance the effective dates of the remaining offerings contained in the captioned transmittals.

5. Accordingly, IT IS ORDERED that Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal Nos. 1777, 1778, 1781, 1785, 1787, 1792, 1795, 1799, and 1801, are subject to the investigation instituted in CC Docket No. 88-136.

6. IT IS FURTHER ORDERED that Southwestern Bell Telephone Company may file tariff revisions, to be effective on not less than one day's notice, in order to advance the effective dates of the remaining offerings contained in the captioned transmittals. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 89-310.

7. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

8. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, Southwestern Bell Telephone Company shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for the services which are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Southwestern Bell Telephone Company, Tr. No. 1777, filed Feb. 13, 1989; Tr. No. 1778, filed Feb. 14 1989; Tr. No. 1781 filed Feb. 17, 1989; Tr. No. 1785, file Feb 24, 1989; Tr. No. 1787, filed Mar. 9, 1989; Tr. No. 1792, filed Mar. 27, 1989; tr. No. 1795, filed Apr. 3, 1989; Tr. No. 1799, filed Apr. 7, 1989; and Tr. No. 1801, filed Apr. 10, 1989.

[2] Southwestern Bell Telephone Company, Application No. 169, filed Apr. 7, 1989, as amended Apr. 20, 1989. This application has been granted. *See* letter from Chief, Tariff Division, Common Carrier Bureau, FCC, to Southwestern, Apr. 24, 1989.

[3] *See* note 5, *infra*.

[4] TCG Petition To Suspend and Investigate at 2-3.

[5] local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (1988) (*Designation Order*). *See also* Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (1988); Public Notice, Network Communications, Inc., Files Comments on Individual Case Basis Rates for DS3 Services, CC Docket No. 88-136, 4 FCC Rcd 846 (1989). The Bureau is also investigating certain generalized DS3 rate structures which took effect on April 1, 1989. *See*

Annual 1989 Access Tariff Filings, Memorandum Opinion and Order, Da 89-337, released Mar. 22, 1989, *recon. & app. for review pending,* at paras, 537-539.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 87-5

In the Matter of

Amendment of §§ 22.501(g)(2) and 94.65(a)(1) of the Rules and Regulations to Re-Channel the 900 MHz Multiple Address Frequencies	RM-5206
Amendment of § 94.65(a)(1) of the Rules to Revise Footnote 3 in the Frequency Table to Make the Frequencies Available for use by any Part 94 Eligible	RM-5362
Amendment of Part 2 and §§ 94.63(d)(5) and 94.65(a)(1) Footnote 3 of the Rules to Permit Operation of Mobile Remote Meter Reading Systems on a Primary Basis on the Exclusive Power Radio Service Frequencies in the 952.3625 - 952.8375 MHz Band	RM-5178
Amendment of Part 94 of the Rules to Permit Intrasystem Communications Among Multiple Address System Master Stations	RM-5383

ERRATUM

Released: May 3, 1989

By the Chief, Private Radio Bureau:

On March 22, 1989, the Commission released a Memorandum Opinion and Order (FCC 89-81, 4 FCC Rcd 2491 (1989) in the above captioned proceeding. The effective date of the rule changes adopted in the Memorandum Opinion and Order is hereby changed from **May 8, 1989,** to **June 19, 1989,** to allow time for notice by publication of a summary of the Memorandum Opinion and Order in the Federal Register. Furthermore, Appendix A of the Memorandum Opinion and Order is corrected as shown below to include an inadvertently omitted paragraph in Section 94.63 (d)(4)(i) of our Rules, 47 C.F.R. § 94.63 (d)(4)(i).[1]

§ 94.63 Interference protection criteria for operational fixed stations.

* * * * *

(d) * * *

(4) * * *

(i) For multiple address stations in the 928-960 MHz band a statement that the proposed system complies with the following co-channel separations from all existing stations and pending applications.

Fixed-to-fixed	145 km (90 miles)
Fixed-to-mobile	113 km (70 miles)
Mobile-to-mobile	81 km (50 miles)

Multiple address systems employing only remote stations shall be treated as mobile for the purposes of determining the appropriate separation. For mobile operation, the mileage is measured from the reference point specified on the license application.

* * * * *

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTE

[1] For clarification, we note that, as of June 19, 1989, the power reduction tables set forth in 47 C.F.R. § 94.65 (a)(1)(iv), as revised in Report and Order, PR Docket No. 87-5, 3 FCC Rcd 1564 (1988), are also in effect. The standards in that table were previously stayed pending reconsideration of the Report and Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-100

In the Matter of

Amendment of Section 73.202(b), RM-5031
Table of Allotments,
FM Broadcast Stations.
(Freedom and Morgan Hill,
California)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: April 19, 1989; Released: May 4, 1989

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration two petitions for reconsideration, filed by KMBY, Inc. (KMBY), former licensee of FM Station KMBY, Channel 296A, Seaside, California and Richard S. and Susan B. Bushell, against the *Report and Order* which allotted Channel 241A to Morgan Hill, California as that community's first local service and substituted Channel 298A for Channel 240A at Freedom, California.[1] Cypress Communications, present licensee of Station KMBY(FM) filed supplemental comments to KMBY's petition for reconsideration.[2] Comments were filed by Laura Hopper ("Hopper"), permittee for Channel 298A, Freedom, California.[3] Oppositions to the petitions for reconsideration were filed by Eric R. Hilding ("Hilding") an applicant for the Channel 241A, Morgan Hill allotment. Opposition to the supplemental comments were filed by South Valley Broadcasting ("South Valley"), a California Limited Partnership and Eric R. Hilding (who joined South Valley as a general partner) applicants for Channel 241A at Morgan Hill.

BACKGROUND

2. The *Notice of Proposed Rule Making* ("Notice"), 51 FR 11952 (1986), proposed the allotment of Channel 241A to Morgan Hill, California as that community's first local service. In order to accommodate this allotment, we also proposed to substitute Channel 298A for vacant Channel 240A at Freedom. The Freedom substitution was proposed with a 6.9 kilometers south site restriction to avoid short spacing to Station KTSN(FM) Channel 297, Stockton, California, and KSOL(FM), Channel 299, San Mateo, California. We received supporting comments from petitioners Eric R. Hilding and Claudia W. Bartosiewicz, and Crosswell C. Collins. On March 19, 1987, the Commission adopted the *Report and Order* granting the proposed allotment to Morgan Hill, and the Freedom substitution.[4]

KMBY/CYPRESS' PETITION FOR RECONSIDERATION[5]

3. In its petition for reconsideration, KMBY opposes the allotment of Channel 298A for Channel 240A at Freedom, arguing that a Channel 298A allotment at Freedom precludes Station KMBY from being able to upgrade on Channel 296 in Seaside, California, from Class A to Class B1 as proposed in MM Docket No. 87-566.[6] In supplemental comments filed by Cypress, Cypress states that notwithstanding the Commission's action in Seaside, California, granting the proposed upgrade of KMBY(FM) to Channel 296B1, this action does not eliminate the basis for KMBY's petition since the site restriction placed on the new transmitter site limits the area in which the KMBY(FM) transmitter can be located and meet all spacing requirements and still provide a 70 dBu or better signal to all of Seaside.[7]

4. We will deny the petition for reconsideration. Cypress has not demonstrated that the Commission's action allotting Channel 298A to Freedom precludes the Seaside upgrade on Channel 296B1. In response to the *Notice* in MM Docket No. 87-566, KMBY submitted a showing that from a site 21.1 kilometers south of Seaside it could provide a 70 dBu signal over Seaside and that the site was fully spaced to the stations in Stockton and Freedom, California. Cypress has not rebutted that showing or supported its allegation that the site relied upon by the Commission in allotting Channel 296B1 to Seaside is unworkable. While the 21.1 kilometers site restriction may in fact limit the area available to the licensee to locate its transmitter and still provide a 70 dBu signal to Seaside, this does not justify setting aside our actions in either the Freedom/Morgan Hill proceeding or the Seaside upgrade.

BUSHELL'S PETITION FOR RECONSIDERATION

5. The Channel 298A allotment to Freedom protects the reference coordinates for the Channel 300B allotment at Greenfield, California. However, the Freedom allotment does restrict the available transmitter sites for the Greenfield applicants. For this reason, Bushell opposes the Commission's action allotting Channel 298A to Freedom, California. Bushell claims that the Commission erred by failing to serve a copy of the *Notice* in the Morgan Hill proceeding on the pending applicants for Channel 300B at Greenfield. Bushell contends that the Greenfield applications had been tendered to the Commission and a majority of the applications accepted for filing by the Commission eight to nine months prior to the *Notice*. Bushell contends that the rights of the Greenfield applicants were ignored since the Commission had knowledge of the applications and no notice or opportunity for comment period was given to the applicants. Finally, Bushell questions whether the allotment of Channel 241A to Morgan Hill and Channel 298A to Freedom are in the public interest in light of the site restriction that will be placed on the Greenfield Channel 300B station.

6. We believe the Commission's failure to serve a copy of the *Notice* on the Greenfield applicants did not constitute error and did not prejudice their rights. We further believe that the Greenfield applicants interests were considered in the instant proceeding and the Commission's

action allotting Channel 241A to Morgan Hill and substituting Channel 298A for Channel 240A was proper and should not be reversed.

7. The first argument advanced by Bushell is without merit. The Commission's failure to serve a copy of the *Notice* on the Greenfield applicants did not constitute error since the Commission was not required to serve a copy of the *Notice* on the Greenfield applicants. The Commission was only required to publish the *Notice* in the Federal Register pursuant to Section 1.412 of the Commission's Rules. Once the Freedom allotment was made, the affected applicants were served a copy of the *Report and Order* in order to expedite the processing of these applications.[8]

8. We further disagree that the applicants' rights were prejudiced by not having an opportunity to respond to the *Notice*. First, the *Notice* was based on compliance with the minimum distance separation requirements between the proposed Freedom substitution and the reference coordinates for Greenfield, thus providing the ultimate licensee in Greenfield with the flexibility to provide adequate city grade coverage to the community and comply with the minimum spacing requirements. Second, the Commission generally does not protect an applicant's preferred transmitter site from a rule making petition which proposes a new service. That is regarded as a benefit to the applicant rather than the public. *See Andalusia, Alabama*, 49 FR 32201, published August 13, 1984. Generally, the applicant is given an opportunity to amend to a non-conflicting site. Since the Greenfield applicants were permitted to amend their applications to facilitate the new allotment, the Commission's failure to serve a copy of the *Notice* did not constitute error by prejudicing the applicants' rights.

9. We also disagree that the Greenfield applicants' rights were ignored or that the applicants were treated unfairly by the Commission's action in the Morgan Hill/Freedom proceeding. As we stated in the *Report and Order*, our decision to allot Channel 241A to Morgan Hill and to substitute Channel 298A for Channel 240A at Freedom was based on the Commission's allotment priorities adopted in *Revision of FM Policies and Procedures*, 90 FCC 2d 88 (1982), which favored the provision of a first local service to Morgan Hill. As we noted above, where a pending allotment and pending application are in technical conflict the Commission considers the applied for site to be only a preference for a particular location and absent a compelling showing that use of the site would better serve the public interest, instead favors the allotment since it represents a new service. *See Andalusia, Alabama, supra; Las Vegas, Nevada*, 59 RR 2d 1330 (1986). Bushell has presented no evidence nor provided any information showing that its proposed transmitter location would better serve the public interest then the provision of a first local service at Morgan Hill. Bushell simply complains that as a result of the site restriction imposed on Channel 300B the transmitter site will have to be located 15 kilometers further down the Salinas Valley away from the majority of the station's potential audience area. We agree with opponents that this argument presents no countervailing public interest considerations. Channel 300 will provide Greenfield with a new local service. The allotment is also compatible with, the use of Channel 241A at Morgan Hill and Channel 298A at Freedom.

10. In view of the foregoing, neither petitioner has provided a sufficient basis to justify a grant of reconsideration.

11. IT IS ORDERED, That the Petition for Reconsideration filed by KMBY, Inc., IS DENIED.

12. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Richard S. and Susan B. Bushell, IS DENIED.

13. IT IS FURTHER ORDERED, That the Motion for Leave to File Supplemental Comments, filed by Cypress Communications, Inc., IS GRANTED.

14. IT IS FURTHER ORDERED, That the Opposition to Motion for Leave to File Supplemental Comments, filed by South Valley Broadcasting, IS DENIED.

15. IT IS FURTHER ORDERED, That this proceeding, IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] *Report and Order*, 2 FCC Rcd 2182 (1987).

[2] The license for Station KMBY(FM) was assigned to Cypress Communications, Inc., on July 1, 1988.

[3] Hopper states that if reconsideration is granted, the Commission should allot Channel 241A to Freedom instead of Channel 240A, as counterproposed by Hopper in her original comments. Alternatively, Hopper opposes reconsideration if Channel 240A is allotted to Freedom. In light of our action denying reconsideration and affirming our action in Freedom and Morgan Hill, Hopper's comments need not be considered.

[4] Originally, KMBY filed comments in the Morgan Hill/Freedom proceeding opposing the substitution of Channel 298A for Channel 240A at Freedom. However, these comments were late-filed and not considered in that proceeding.

[5] In opposition Hilding argues that, 1) KMBY's original comments were properly disregarded in the rule making proceeding, 2) KMBY's position is speculative, 3) KMBY advocates expansion of existing service compared to the establishment of a new service, 4) KMBY makes no comparative showing between the two communities. In view of our finding that the Freedom/Morgan Hill allotment and the Seaside upgrade were in the public interest and Cypress failed to support its arguments to the contrary, these oppositions will not be specifically addressed.

[6] On August 17, 1988, in MM Docket No. 87-566, the Commission substituted Channel 296B1 for Channel 296A at Seaside, California, as requested by KMBY, and modified the Class A license of Cypress Communications, Inc. (formerly KMBY, Inc.) for Station KMBY(FM) to specify operation on the higher class channel. *See Report and Order*, 3 FCC Rcd 5607 (1988).

[7] South Valley and Hilding argue that Cypress' supplemental comments should be stricken to the extent that Cypress attempts to make additional technical arguments beyond those already made in the petition for reconsideration. However, Cy-

press' comments will be accepted since they were filed in response to a staff request and they essentially clarify arguments previously made by petitioners.

[8] Bushshell is also incorrect in its statement that the Greenfield applications were accepted for filing prior to adoption of the *Notice* in this proceeding. The Greenfield applications were accepted for filing on March 20, 1987. This is nearly a year after the *Notice* was adopted in this proceeding on March 18, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-286

In the Matter of

Amendment of Section 73.202(b), RM-6378
Table of Allotments,
FM Broadcast Stations.
(Henderson, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 24, 1989; Released: May 4, 1989

By the Chief, Allocations Branch:

1. Pursuant to the request of Chester County Broadcasting Co., Inc. (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 4025 (1988), proposing the allotment of Channel 299A to Henderson, Tennessee, as that community's second local FM service.[1] Petitioner filed supporting comments restating its intention to apply for the channel.

2. Channel 299A can be allotted to Henderson, Tennessee, in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules.[2]

3. We believe the public interest could be served with the allotment of a second local FM service at Henderson. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 19, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Henderson, Tennessee	240A, 299A

4. The window period for filing applications will open on **June 20, 1989,** and close on **July 20, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The *Notice* incorrectly stated this proposal would provide a first local FM service to Henderson.

[2] The coordinates are 35-26-24 and 88-38-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-267

In the Matter of

Amendment of Section 73.202(b), RM-6353
Table of Allotments,
FM Broadcast Stations.
(Vidalia, Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 24, 1989; Released: May 4, 1989

By the Chief, Allocations Branch:

1. At the request of John H. Pembroke (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 3998 (1988), proposing the allotment of Channel 284A to Vidalia, Louisiana, as that community's first local FM service. Petitioner filed supporting comments restating his intention to apply for the channel. Joseph Aaron Radiocasting, Inc. also filed supporting comments stating an interest in applying for the channel.

2. Channel 284A can be allotted to Vidalia in compliance with the Commission's minimum distance separation requirements with a site restriction of 1.0 kilometers (0.6 miles) northwest of the city.[1] The restriction is necessary to avoid a short spacing to Station WZFL-FM, Channel 284A, Centreville, Mississippi.

3. We believe the public interest could be served by the allotment of Channel 284A to Vidalia, as a first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 19, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Vidalia, Louisiana	284A

4. The window period for filing applications will open on **June 20, 1989,** and close on **July 20, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The restricted site coordinates are 31-34-20 and 91-25-51.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-271

In the Matter of

Amendment of Section 73.202(b), RM-6357
Table of Allotments,
FM Broadcast Stations.
(Farmville, Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 24, 1989; Released: May 4, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 3976 (1988), issued in response to the request of James H. Dulaney (petitioner), proposing the allotment of Channel 267A to Farmville, Virginia, as that community's second local FM service. Petitioner filed supporting comments restating his intention to apply for the channel. Channel 267A can be allotted to Farmville, Virginia, in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules.[1]

2. We believe the public interest could be served with the allotment of a second local FM service at Farmville. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 19, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Farmville, Virginia	239B, 267A

3. The window period for filing applications will open on **June 20, 1989,** and close on **July 20, 1989.**

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The reference coordinates are 37-18-00 and 78-23-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-100

In the Matter of

Amendment of Section 73.202(b), RM-6647
Table of Allotments,
FM Broadcast Stations.
(Sargent, Nebraska)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 24, 1989; Released: May 4, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by E. Eugene McCoy, Jr. (petitioner), requesting the allotment of Channel 221C1 to Sargent, Nebraska, as a first local FM service. Petitioner states that he will apply for the channel, if allotted. Channel 221C1 can be allotted to Sargent in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

2. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies ". . .among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to satisfy its status. Sargent is not listed in the U.S. Census and petitioner has not stated whether it is incorporated or not.[2] Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Sargent is incorporated, or that it has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. *See, e.g., Ansley, Alabama*, 46 Fed. Reg. 58688, published December 3, 1983, *Cascade Village, Colorado*, 48 FR 19917 (1983) and *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985.

3. We believe the public interest would be served by proposing the allotment of Channel 221C1 to Sargent, Nebraska, if it is ultimately concluded that the place is a community for allotment purposes. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the place listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Sargent, Nebraska	–	221C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 26, 1989,** and reply comments on or before **July 11, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

E. Eugene McCoy, Jr.
1211 10th Avenue
Central City, Nebraska 68826
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for this allotment are North Latitude 41-38-30 and West Longitude 99-22-18.

[2] We do note that Sargent is listed in the 1988 Rand McNally Commercial Atlas and attributed with a population of 828 persons. However, mere geographical location is not sufficient to establish "community" status. *See, Vimville, Mississippi,* 48 FR 5974 (1983).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-101

In the Matter of

Amendment of Section 73.202(b),	RM-6654
Table of Allotments,	
FM Broadcast Stations.	
(Chateaugay, New York)	

NOTICE OF PROPOSED RULE MAKING

Adopted: April 24, 1989; **Released: May 4, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Four Seasons Communications, Inc. (petitioner) requesting the allotment of Channel 234A to Chateaugay, New York, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. Channel 234A can be allotted to Chateaugay with a site restriction of 1.0 kilometers (0.6 miles) south to avoid prohibited interference to Canadian stations and/or allotments at Montreal, Vianney, Trois Riveres and Hull, Quebec, Canada.[1] Canadian concurrence is required since Chateaugay is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allotment of Channel 234A to Chateaugay, New York, since an interest has been expressed in providing the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Chateaugay, New York	–	234A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 26, 1989,** and reply comments on or before **July 11, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Timothy D. Martz
President, Four Seasons Communications, Inc.
273 Whiting Pond Road
P.O. Box 36
Fairfield, Connecticut 06430
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b), 73. 504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in

initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 44-54-57 and West Longitude 74-04-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-102

In the Matter of

Amendment of Section 73.202(b), RM-6636
Table of Allotments,
FM Broadcast Stations.
(Burnham, Pennsylvania)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 24, 1989; Released: May 4, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by DB Communications (petitioner), requesting the allotment of Channel 262A to Burnham, Pennsylvania, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. Channel 262A can be allotted to Burnham in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.9 kilometers (2.4 miles) southwest to avoid a short-spacing to Station WLIZ, Channel 263A, Elizabeth, Pennsylvania.[1] Canadian concurrence is required since Burnham is located within 320 kilometers of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allotment of Channel 262A to Burnham, Pennsylvania, since an interest has been expressed in providing the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Burnham, Pennsylvania	--	262A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 26, 1989,** and reply comments on or before **July 11, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James M. Weitzman, Esq.
Kaye, Scholer, Fierman, Hays & Handler
The McPherson Building
901 - 15th Street, N.W., Suite 1100
Washington, D.C. 20005
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b), 73. 504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in

initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 40-36-08 and West Longitude 77-35-43.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 27, 1989

COMMENTS INVITED ON SOUTHERN CALIFORNIA PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for the Southern California area (Region 5).

In accordance with the Commission's Report and Order in General Docket 87-112 implementing the Public Safety National Plan, parties are hereby given thirty days from the date of Federal Register publication of this public notice to file comments and fifteen days to reply to any comments filed. (*See* Report and Order, General Docket 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 5 consists of all of Southern California to the northernmost borders of San Luis Obispo, Kern, and San Bernardino Counties. (*See* Memorandum Opinion and Order, General Docket 87-112, 3 FCC Rcd 2113 (1988).)

Comments should be clearly identified as submissions to **General Docket 89-97, Southern California Area - Region 5,** and commenters should send an original and five copies to the Secretary, Federal Communications Commission, Washington, DC 20554.

Questions regarding this public notice may be directed to Fred Thomas, Office of Engineering and Technology, (202) 653-8112, or Maureen Cesaitis, Private Radio Bureau, (202) 632-6497.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEW YORK TELEPHONE COMPANY
Tariff F.C.C. No. 40

Transmittal No. 961

Optional Calling Plan for
New York/New Jersey Corridor

ORDER

Adopted: April 17, 1989; Released: April 19, 1989

By the Chief, Common Carrier Bureau:

1. On January 20, 1989, New York Telephone Company (NYT) filed the above-captioned transmittal to decrease the rates for its interstate Message Telecommunications Service (MTS) for traffic in the corridor between New York and New Jersey. NYT's Optional Calling Plan (OCP) would offer customers a 40 percent discount from present NYT MTS daytime rates for a minimum of one hour's use. NYT Description and Justification at Section 1. MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate the tariff and US Sprint Communications Company Limited Partnership (US Sprint) filed a petition to reject, or in the alternative, to suspend and investigate, on February 7, 1989. NYT filed a reply to both petitions on February 17, 1989.

2. MCI alleges that NYT, without explanation, has lowered its Total Plant in Service investment, and has used a lower figure for its "FCC investment adjustment"[1] than it used in its 1989 Annual Access Filing. MCI Petition at 3-4. MCI also challenges NYT's reduction in the amount of its prospective investment in interexchange Central Office Equipment (COE) Transmission. *Id.* at 2-3.

3. US Sprint avers that NYT has failed to include certain rate elements in calculating the OCP's per minute access charges -- an information surcharge, a blocking charge, and a pro rata share of NYT's equal access cost recovery (EACR) charge. US Sprint Petition at 3. US Sprint also charges that NYT failed to include the commercial, marketing, and processing costs required to implement the proposed OCP. *Id.*

4. NYT replies that MCI's allegation that NYT unjustifiably reduced interexchange COE Transmission investment from $5.8 million in 1988 to $741,000 in 1989 is based on figures provided by NYT in its 1989 Annual Access TRP. NYT maintains that MCI has not demonstrated an unjustified reduction, but rather has identified an error in NYT's TRP, which it will correct. NYT Reply at 2-3. NYT also disputes MCI's contention that NYT has underallocated the FCC investment adjustment to interexchange. *Id.* at 3-4. NYT states that MCI relies on erroneous figures which were subsequently corrected by Transmittal No. 969, filed February 8, 1989.

5. In response to US Sprint's objections, NYT states that it has included a Bell Atlantic information surcharge in its costs, and that a blocking charge is not required. NYT Reply at 4-7. NYT also disagrees that it should apply a pro rata share of its EACR charge to itself, contending that the EACR charge is applied only to presubscribed lines. *Id.* NYT further asserts that its marketing, commercial, and processing costs were included under Customer Operators Expenses, Accounts 6610 and 6620. *Id.* at 10-11.

6. The Common Carrier Bureau has reviewed the tariff transmittal and the various pleadings. We conclude that no compelling argument has been presented that the tariff proposal is patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time.

7. Therefore, IT IS ORDERED that the petition to suspend and investigate filed by MCI Telecommunications Corporation, and the petition to reject, or in the alternative, to suspend and investigate filed by US Sprint Communications Company Limited Partnership, in response to New York Telephone Company, Tariff F.C.C. No. 40, Transmittal No. 961, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] The FCC investment adjustment, which is defined in the 1989 Annual Access Tariff Review Plan (TRP), is based on the net of various plant investments listed in the TRP which have been expressly allowed or disallowed by the Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 27, 1989

NATIONAL TELEPHONE SERVICES, INC. AND INTERNATIONAL TELECHARGE, INC. PETITION FOR WAIVERS OF LIMITED PORTIONS OF THE CALL BLOCKING PROHIBITION ADOPTED BY THE COMMON CARRIER BUREAU ON FEBRUARY 27, 1989.

National Telephone Services, Inc. (NTS) and International Telecharge, Inc. (ITI) have filed petitions requesting partial or limited waivers of call blocking provisions of the Bureau's Memorandum Opinion and Order in *Telecommunications Research and Action Center, et al. v. International Telecharge, Inc., et al.*, DA 89-237 (released February 27, 1989). Specifically, NTS and ITI seek waivers of certain portions of the no blocking provisions of the Order for a period of 18 months. The petitions maintain such limited blocking is necessary to prevent fraudulent use of the network and where customer premise equipment (CPE) is technically incapable of recognizing and routing 10XXX calls to the appropriate long distance carrier. (These petitions do not seek a waiver of the Bureau's Order with respect to 1-800 and 950 routings.) They further maintain that 18 months will be required to solve various hardware and software problems associated with CPE, as well as certain network problems. In addition, ITI seeks Bureau clarification regarding the applicability of the no blocking requirement with respect to the 10XXX access in areas that have not been converted to equal access. Finally, NTS requests that the Commission hold industry workshops in which long distance carriers, local exchange carriers and manufacturers may participate in an effort to address the issue of call blocking.

Interested parties may file comments concerning the NTS and ITI waiver petitions within 30 days of the release of this Public Notice. Reply comments should be filed within 15 days thereafter. All filings should refer to File No. ENF-89-08. We request commenting parties, *inter alia,* to address with specificity what, if any, CPE, by manufacturer, and model number, may suffer from the alleged inadequacies, what specific problems may be associated with central offices that have not been converted to equal access and what, if any, alternative means of access to interexchange carriers may be available to consumers in the event the Petitions are granted in whole or in part. Parties should document such materials with affidavits where appropriate.

Copies of the waiver petitions and any subsequently filed documents in this matter may be obtained from International Transcription Services, 2100 M Street, N.W., Suite 140, Washington, D.C. 20036, (202) 857-3800. The NTS and ITI petitions and other documents will also be available for review and copying in Suite 6206, 2025 M Street, N.W., Washington, D.C. 20554.

For further information, contact Thomas D. Wyatt at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 27, 1989

INVESTIGATION OF ALTERNATE TECHNOLOGIES IN THE PROVISION OF EQUAL ACCESS CLARIFICATION OF SUBMISSION OF PLEADINGS

On March 17, 1989, the Common Carrier Bureau issued an Order regarding alternate equal access arrangements proposed or implemented by various Bell Operating Companies (BOCs). Southwestern Bell Telephone Company, *et al.*, CC Docket No. 88-287, Order Designating Issues for Investigation, DA 89-309, released Mar. 17, 1989 (*Designation Order*). In that Order, the Bureau expressed concern, *inter alia*, about the additional post dial delay caused by these technologies and the impact of the use of these technologies on the telecommunications network, designated certain issues for investigation, and established a pleading cycle.

In a subsequent Bureau Order, certain proposed tariff revisions filed by Contel Service Corporation (Contel) regarding the use of alternate technologies in the provision of equal access were incorporated into the ongoing investigation in this docket. Contel Service Corporation, Transmittal No. 7, CC Docket No. 88-287, Memorandum Opinion and Order, DA 89-317, released Mar. 20, 1989 (*Contel Order*). Contel was directed to respond to the issues in the *Designation Order*, and to an additional issue regarding the use of these technologies by independent telephone companies. Contel was also made subject to the pleading cycle established in the *Designation Order*. *Contel Order* at para. 16 & n.33. The Bureau later extended the deadlines for submissions in this investigation by one week. Southwestern Bell Telephone Company, et al., CC Docket No. 88-287, Order, DA 89-407, released Apr. 11, 1989.

We recognize that interested parties may wish to file comments in support of the direct cases. Paragraph 31 of the *Designation Order*, however, refers only to the procedure for filing oppositions. Accordingly, interested parties may file comments in support of the direct cases no later than the date for filing oppositions, May 26, 1989, and such comments must be entitled "Comments on Direct Case."

For further information, contact Walt Steimel, Tariff Division (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 25, 1989

NEW LAWS AFFECT BROADCAST OF LOTTERY INFORMATION

On October 17, 1988, the President signed into law the Indian Gaming Regulatory Act. This Act, which became effective immediately, establishes a National Indian Gaming Commission ("Gaming Commission") and a regulatory framework to govern bingo and certain other gaming activities conducted on Indian lands. Bingo or other games that are conducted by an Indian tribe pursuant to this Act are exempted from the prohibition on the broadcast of lottery information contained in the federal criminal code at 18 U.S.C. §1304. Accordingly, such games may be advertised or promoted on broadcast media.

In the period before the Gaming Commission is established, the Office of the Solicitor in the Department of the Interior will provide information on whether a particular game is being conducted pursuant to the Act. Michael Cox is the Interior Department's contact person for questions concerning the Act and for obtaining determinations as to which games are in compliance with the Act. He can be reached at (202) 343-9331.

This Act supersedes in part section 73.1211 of our regulations governing the broadcast of lottery information, and section 76.213, governing the cablecast of lottery information. The Commission shortly will take action to conform its regulations with the provisions of the Act. Until this action is completed, the existing regulations will not be applied to bingo or other games that are conducted by an Indian tribe pursuant to the Act as determined by the Office of the Solicitor in the Department of the Interior or, when established, by the Gaming Commission.

In another action affecting the broadcast of lottery information, on November 7, 1988, the President signed into law the Charity Games Advertising Act of 1988. This Act will become effective on May 7, 1990. At that time the law will allow broadcast advertisements of certain lotteries in states that allow such activities. More specifically, broadcasters will be permitted to promote, provide information about, or advertise lotteries conducted by not-for-profit organizations, governmental organizations and, if the lottery is clearly occasional and ancillary to the primary business of the commercial organization, by commercial entities as long as the particular lottery is authorized or not otherwise prohibited by the state in which it is conducted. This statute will not remove the prohibition on broadcast advertising for gambling casinos, such as those in Las Vegas, Nevada, and Atlantic City, New Jersey. Finally, the new law will permit broadcast stations in any state that conducts a lottery to advertise any state-conducted lottery. Currently the criminal code permits stations in a state that conducts a lottery to broadcast only those advertisements concerning that state's lottery or state-conducted lotteries in adjacent states. Broadcasters are cautioned that this new law takes effect on May 7, 1990. Prior to that date the Commission will take action to change its rules effective May 7, 1990. Until then, the broadcast of the type of lottery information described above remains prohibited by both the federal criminal code and the Commission's rules.

For further information contact Ben Halprin, (202) 632-3860.

FEDERAL COMMUNICATIONS COMMISSION

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